
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT ²

No. 3012

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants-Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,
Plaintiff-Appellee.

} Appeal from the United
States District Court
for the District of
Arizona.

BRIEF ON BEHALF OF THE COCA-COLA COMPANY,
PLAINTIFF-APPELLEE.

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FILED

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BRIEF AND ARGUMENT FOR APPELLEE.

I.

Statement of the Case.

This is an appeal from an interlocutory order entered after hearing on pleading and proofs enjoining the defendants below, appellants here, from trade-mark infringement and unfair and fraudulent trade practices in the manufacture and sale of soft drinks arising out of the following facts:

The Coca-Cola Company is the manufacturer and seller of the well known and widely advertised beverage, Coca-Cola, and is a Georgia corporation, organized in 1892. It is successor to the trade rights of various in-

dividuals and copartnerships with respect to this product. The Coca-Cola Company's chain of title is complete and is evidenced by documents, reproductions of which are in the record. An abstract with appropriate references to the testimony will be found in Schedule I. Indeed, The Coca-Cola Company's title to the business of manufacturing and selling Coca-Cola and its ownership of the trade rights therein are not disputed.

Coca-Cola has acquired certain familiarly used nicknames. Those involved in the present case are the words "Koke," into which the name Coca-Cola is commonly abbreviated by the public, and "Dope," which is a nickname for Coca-Cola in certain sections of the country.

The acts of infringement and unfair trade complained of are the sale by the Koke Companies of a product not Coca-Cola under the names Koke and Dope, the abbreviation and nickname, respectively, by which Coca-Cola is known to the public. The Koke Companies' product whether sold under the name Koke or Dope is the same thing. They use two names for the same article because Coca-Cola is known in some places as "Koke" and in others as "Dope." In this way they are enabled to take every advantage of whatever Coca-Cola nickname may be in use in any locality. The Koke Companies have also imitated the Coca-Cola bottle labels under which bottled Coca-Cola is sold to the public. They also duplicate the red barrels in which Coca-Cola syrup is invariably shipped, and they unnecessarily simulate the distinctive coloring of the product itself. All of these are correlative acts of unfair competition and are efficient aids in the fraudulent scheme of pirating The Coca-Cola Company's good will and business.

The Koke Companies' intentional false representation to the public, effectuated by the sale of their product un-

der the names Koke and Dope, thus placing an instrument of fraud in the hands of dealers, is made plain by the express representation of their agents and salesmen to dealers that Koke and Dope can be sold as and for Coca-Cola and the suggestion that this be done. The inevitable result has followed and the Koke Companies' goods are in fact sold as and for Coca-Cola and the public is thus deceived and The Coca-Cola Company is injured. It is not necessary to indulge in any speculation concerning the motives behind the Koke Companies' conduct. It is plain from the record in this case that their scheme is a deliberately fraudulent one, piratical in its inception and dishonest in its operation.

As a means of carrying out the deception involved in the use of the Coca-Cola nicknames Koke and Dope and as a device to impress their customers and give a legal aspect to the fraud, J. C. Mayfield, who is the alleged predecessor in title of the various Koke Companies and an officer of several of them, purchased certain trade-mark registrations in the United States Patent Office of the words Koke and Dope.

The Murfreesboro Bottling Works of Murfreesboro, Tenn., on August 21, 1906, registered as a trade-mark for beverages the word Koke. The certificate is number 55,878.

Houppert & Worcester, of Birmingham, Ala., on June 4, 1907, secured a registration in the Patent Office of the word Dope. The certificate is number 63,033.

In 1898 W. L. Bitting, of Sherman, Texas, secured a label registration showing the word "Koke" claimed to be applied to a chemical compound, and Bitting, on August 21, 1911, applied for a trade-mark registration of the word Koke for a beverage.

These registrations were purchased by J. C. Mayfield, and later were assigned by him to the Koke Company of

America, which company has attempted to license the other Koke Companies, to use these words.

These purchases were made prior to the issuance of the last registration to W. L. Bitting, above named, and the certificate, number 94,869, was issued on January 13, 1914, to the Koke Company of America as Bitting's assignee.

It appears from the testimony in this case that the applicants for registration in each instance applied with knowledge that the words Koke and Dope were commonly used nicknames for Coca-Cola and these registrations were purchased by Mayfield as a part of his scheme to pirate upon The Coca-Cola Company's trade rights, and for the purpose of justifying and apparently legalizing the sale of the Koke Companies' product to the public in response to requests for Koke and Dope, which requests, of course, were definite demands for Coca-Cola, so intended by the purchaser and so understood by the seller.

These registrations form an important element in the Koke Companies' plan of unfair trading. One of their cards is here illustrated:



REG. U.S. PAT. OFF.
DEC. 27, 1898 N° 6752
AUG. 21, 1906 N° 55,878



UNITED STATES, MEXICO, CUBA AND CANADA.
SUBSIDIARY OFFICES
CHICAGO, ST LOUIS, CHATTANOOGA, DALLAS, LOS ANGELES,
NEW ORLEANS, WASHINGTON AND NEW YORK.



REG. U.S. PAT. OFF.
JUNE 1, 1907, N° 63,033
Koke & Dope
ARE NON-ALCOHOLIC AND HAVE
NO HARMFUL EFFECT.

NOTICE !

Our customers will please notify US, or the INDUSTRIAL SURETY CO. of NEW YORK of any infringements on our trade-marks "KOKE" or "DOPE," or of any one substituting any other beverage on calls for "KOKE" or "DOPE." This is a violation of the Federal laws, and we will prosecute any and all persons who thus infringe upon our rights, to the fullest extent of the law.

KOKE COMPANY OF AMERICA
J. C. MAYFIELD, President

PRESENTED BY

J. W. MAYFIELD

REPRESENTING THE NEW ORLEANS OFFICE

[OVER]

Similar warnings and threats appear in the Koke Companies advertisements in trade papers to dealers. For example, there appears in an advertisement in the Southern Carbonator and Bottler the statement, "Keep Your Conscience Clear. We have the sole right to sell 'Koke' or 'Dope' and are protected in the use of these names by United States trade-mark registrations as shown above." (Rec., 1686.)

Mayfield describes the Koke Companies' products as "the legalized drink." (Rec., 1687.)

Thus it will be seen that a product which sells to the trade for less than Coca-Cola (Rec., 1687), and is sold to the consumer at the same price and under nicknames always applied to Coca-Cola and as a "legalized drink," substitution for Coca-Cola is not only suggested and invited, but is announced to be legitimate, legally unassailable and licensed, indeed compelled under penalty, by the Federal Government.

The court below found as facts from the evidence that the words Koke and Dope are each an abbreviation of Coca-Cola and are used by the public and by purchasers in designating Coca-Cola. That these words were adopted and used by the Koke Companies and Mayfield with the deliberate purpose of representing their goods to be the product and manufacture of The Coca-Cola Company and that the Koke Companies' salesmen were instructed to sell and did sell Koke and Dope as and for Coca-Cola.

Judge Sawtelle in his opinion said (235 Fed., 408):

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for

that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff.

* * * *

I am convinced that when the witness Mayfield adopted the name 'Koke,' he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company. I further find that the purchase of the trademark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

* * * *

The witness Wright of the Southern Koke Company justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, 'Coca-Cola.' "

One of the labels used by the Koke Companies, which the court below finds and their promoter (Moore) admits was copied from the Coca-Cola label, is here paralleled with a Coca-Cola label each attached to a bottle and as seen by the public. (Rec., 22.)



The Pending Cases between the Parties, and the Decisions in Them.

This is one of five cases arising out of the trade situation just outlined, and in order to see the necessity for the various steps which have been taken, it is desirable at this point to trace the organization of the various Koke Companies, all of which are Arizona corporations.

In 1909, J. C. Mayfield, who claimed rights in the names Koke and Dope by reason of the purchase of the registrations just referred to, was a party to the organization of an Arizona corporation, The Koke Company of America, to which he conveyed certain pretended rights relating to the manufacture and sale of the product and the use of the names. The Koke Company of America by contracts licensed other corporations organized under the laws of Arizona to carry on the sale in certain localities; The Koke Company of Texas, in the State of Texas; The Koke Company of Oklahoma in that State; The Koke Company of Arkansas in the State of Arkansas, and the Southern Koke Company, Ltd., in certain southern territory, including the State of Louisiana.

In point of time (December 26, 1913), the first proceeding to be instituted was an opposition filed in the Patent Office at Washington by The Coca-Cola Company against the attempted registration under the Act of February 20, 1905, by The Koke Company of America of the word Koke as a trade-mark.

The following other suits were brought by The Coca-Cola Company:

This proceeding in the United States District Court, for the District of Arizona, against The Koke Company of America, Southern Koke Company, Limited, Koke Company of Texas, Koke Company of Oklahoma and the Koke Company of Arkansas.

In the United States District Court for the Eastern District of Louisiana, Northern Division, against Southern Koke Company, Limited, James L. Wright and J. C. Mayfield, its officers, and a bottler who was bottling Koke under the counterfeit labels. Mayfield is the alleged predecessor in title of all the Koke Companies.

In the United States District Court, for the Northern District of Texas, Dallas Division, against Koke Company of Texas, W. McCarty Moore and G. J. Van Winkle, who were president and secretary, respectively, of the company, E. M. Boyd, a director, and a bottler who was bottling Koke under the labels imitating the Coca-Cola labels.

In the United States District Court, for the Eastern District of Missouri, Eastern Division, against The Koke Company of America, J. C. Mayfield and J. H. Van Deusen. J. H. Van Deusen was the manufacturer of the syrup product for the Koke Companies.

By stipulation an order of court was entered in all the cases whereby the testimony was to be taken but once and filed in all.

Three of the cases have already been argued and decided. This one against the Arizona corporations, was decided by Judge Sawtelle, of the United States District Court for the District of Arizona, on July 7, 1916 (235 Fed., 408), and is here on appeal. The opinion and decree are printed as Appendices I and II to this brief on pages 141 and 153 respectively.

The case in the Louisiana District Court was argued at New Orleans in January, 1917, and decided on May 24, 1917. Judge Foster found all the issues in favor of The Coca-Cola Company and entered a decree enjoining the infringing and unfair practices complained of. This decree is printed as Appendix III to this brief (p. 156).

Injunction writs have been issued and served. No appeal has been taken from Judge Foster's order and the time for appeal has elapsed.

The Patent Office case was decided by the Examiner of Interferences on May 24, 1916. He held that the attempted registration of the word Koke by The Koke Company of America was an effort to appropriate a nickname for Coca-Cola, was a fraud, and refused the registration. The opinion of the Examiner of Interferences is printed at the close of this brief as Appendix IV (p. 159.) An appeal was taken by the Koke Company of America to the Commissioner of Patents who on August 14, 1917, affirmed the Examiner of Interferences. A copy of the Commissioner's opinion is printed as Appendix V of this brief p. 180).

The cases in the United States District Courts in Missouri and in Texas have not yet been argued.

It will thus be seen that this controversy on the same record, between parties identical or in privity has been passed upon by four different judges. The question is one of fact and all four judges have come to the same conclusions—that the Koke Companies were conceived in fraud and launched for the express purpose of pirating the business of The Coca-Cola Company, that their conduct is deliberately fraudulent, and that they are intentionally passing off their product as and for Coca-Cola to the damage and injury of The Coca-Cola Company and the deception of the public. Upon the record in this case it is difficult to see how any other conclusion could have been reached.

The Decisions of the Court Below of the District Court in Louisiana and of the Examiner of Interferences in the Patent Office and of the Commissioner of Patents Are Correct.

There can be no doubt of the correctness of the conclusions of Judge Sawtelle, Judge Foster and the Patent Office authorities in view of the record before them and now before this court.

That the word Koke is a common abbreviation of and the word Dope a familiar nickname for Coca-Cola, and have been for many years, is conclusively established by this record. That the word Koke is such an abbreviation and nickname was found as a fact by the Patent Office authorities and that both Koke and Dope are abbreviations and nicknames of Coca-Cola was found by Judge Sawtelle and Judge Foster. The Patent Office found:

“The opposer (The Coca-Cola Company) has introduced the testimony of numerous witnesses located in different sections of the country to the effect that customers at soda fountains who ask for Koke accept Coca-Cola without objection. In many instances such customers, when asked if they meant Coca-Cola, answered in the affirmative. Some of the witnesses testified that, to their recollection, ‘Koke’ had been used as a nickname for ‘Coca-Cola’ for as much as twenty or twenty-five years. No attempt will be made to make a detailed analysis of the mass of testimony which has been introduced to establish this point of opposer’s case. It is objected to by the applicant on the ground that it is the testimony of interested witnesses and to a certain extent that is true. Much of it is the testimony of detectives employed by the opposer and sent to different parts of the country for the express purpose of collecting evidence. Much of it is the testimony of customers of The Coca-Cola Company. Some of it must be entirely disregarded on the ground that it is mere hearsay. Some was properly objected to on the ground that it was given in response to leading questions.

A large proportion of this evidence, however, is free from objection, other than that it is the testimony of witnesses who, as customers or employes, are more or less interested in the success of the Coca-Cola Company as a commercial institution. No good reason has been shown why such evidence should not be accepted as true. It has been abstracted and tabulated, for convenient reference, on pages 137 to 171 of opposer's brief. It has not been satisfactorily rebutted and counsel for applicant do not contend that the word 'Koke' has not been so used.

* * * * *

It will therefore be regarded as an established fact, for the purpose of deciding this case, that the word 'Koke' has been used quite generally for many years in certain sections of the country, and particularly in Texas, as an abbreviation or nickname, intended to distinguish opposer's goods from goods of like descriptive properties."

Judge Sawtelle held:

"I find that both words (Koke and Dope) are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola."

Judge Foster found as a fact:

"That the words 'Koke' and 'Dope' are each an abbreviation of the word 'Coca-Cola' and are used by the public and purchasers in designating the plaintiff's product 'Coca-Cola.' "

That these conclusions are inevitable from the record here is shown by the quotations from the testimony in Schedule II.

There is no doubt that in many sections of the country the word Koke is the universal designation of Coca-Cola and that in other sections of the country the word Dope is equally a specific request for Coca-Cola, so that a request at any fountain for a drink under the name Koke or Dope is understood to be a definite and specific request for Coca-Cola, both by the buyer and seller. The

testimony is plain and Judge Sawtelle found that the defendants adopted the words Koke and Dope with full knowledge of this fact and for the sole purpose of enabling the sale of the defendants' product as and for Coca-Cola by the use of these familiar nicknames. Judge Sawtelle uses this language:

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendants, Koke Company of America and its predecessors, did not adopt or make use of the name 'Koke' until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff. *Parker v. Stebler*, 177 Fed., 210, 9th Circuit, *The Barbed Wire Patent*, 143 U. S., 275; *Deering v. Winona Harvester Works*, 155 U. S., 286.

I am convinced that when the witness Mayfield adopted the name 'Koke,' he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company.

I further find that the purchase of the trade-mark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

The witness Wright of the Southern Koke Com-

pany justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, 'Coca-Cola.'

The Commissioner of Patents said:

"In fact, it is not seen why anyone would wish to adopt such a trade-mark (Koke) unless it were to justify the retailer in selling his goods on the ground that they were called for when, in fact, the customer had no such thought in mind when asking for a Koke."

Judge Foster found,

"That the words Koke and Dope were adopted and used by the defendants with the deliberate purpose of representing their goods to be the product and manufacture of The Coca-Cola Company."

* * * * *

"That defendants' salesmen were instructed to sell and did sell defendants' product under the names 'Koke' and 'Dope' as and for Coca-Cola."

In view of the admissions and conduct of the officers and incorporators of the Koke Companies no other finding in this respect could be possible. The following appears from the testimony:

W. McCarty Moore, one of the incorporators and the promoter of the Koke Company of America, The Southern Koke Company, Ltd., and the Koke Company of Texas, and at one time an officer and director, testifies that the Koke Companies were organized for the sole purpose of competing with The Coca-Cola Company; that he knew that people asked for Coca-Cola as Koke years before the Koke Companies were organized, and

that he discussed with counsel their right to use the word Koke in view of its being a nickname for Coca-Cola; that he took a Coca-Cola label to a label maker as copy for the Koke labels and that he knows there is confusion between Koke and Coca-Cola.

When the cuts for the making of the Koke label, which Moore copied from the Coca-Cola label, were sent to the Southern Koke Company, Ltd., at New Orleans, there was a dispute about the color of the Coca-Cola label which was to be imitated; that Scott and Cheevers, vice president and salesman, respectively, of the Southern Koke Company, Ltd., went to a printer and could not agree upon the color of the Coca-Cola label, so they sent out and got a bottle of Coca-Cola with a label on it so that they could be sure of duplicating the color exactly.

The color of the paint used by the Koke Companies for barrels containing its product was matched from the Coca-Cola barrels. A paint maker was instructed by the officers of the Southern Koke Company, Ltd., to get a red as near the Coca-Cola red as possible, and old Coca-Cola barrels are habitually used as containers.

Stock was attempted to be sold on the representation that the product of the Koke Company could be passed off as and for Coca-Cola. The salesmen of the Koke Companies went about the country holding out as an inducement to dealers to purchase, that Koke could be passed off for Coca-Cola and the public will not know the difference, and that by reason of the cheaper price its sale was more profitable. These representations of the salesmen of the Koke Companies, the suggestions to dealers that Koke can be successfully palmed off as Coca-Cola are not denied. The salesmen who made them were named (*e. g.*, Patton, Boyd and others), and though still in the employ of the Koke Companies were not called by them as witnesses.

The natural and inevitable result has followed, that Koke and Dope is sold as and for Coca-Cola and the public is deceived. There is no dispute about these facts. Many of them are admitted by the officers of the Koke Companies. None is denied. Indeed, the positions assumed by the Koke Companies in these cases if carried out in practice (and the record shows that they are) necessitate the passing off Koke and Dope for Coca-Cola and further that such passing off is not only legitimate, but not to pass off is illegal. Their salesmen represent to prospective purchasers that Koke and Dope are the same as Coca-Cola; that they are made according to the same formula; that they are indistinguishable, and no one can tell them apart; that under the registrations which Mayfield has the Koke Companies are entitled, under the laws of the United States, to the exclusive use of the words Koke and Dope and that anyone who sells Coca-Cola or anything else in response to requests for Koke or Dope is guilty of unfair trading and violation of the federal trade-mark statutes. The product is sold at a cheaper price than Coca-Cola, thus appealing to the cupidity of the purchaser, as the previous arguments appeal to his timidity or dishonesty.

The record shows that salesmen of the Koke Companies systematically and continually offer these suggestions to intending purchasers. Advertisements in bottlers' trade papers and cards of representatives carry all of these assertions in positive terms. The uniformity of the salesmen's representations coinciding, as they do, exactly with the Koke Companies' trade paper announcements, and their contentions in this and the other cases pending against them show that the plan above outlined is the concerted scheme by which their business is conducted.

The evidence on these various points has been collated for convenient reference and will be found in the schedules.

Schedule I. The Coca-Cola Company's title to the trade-mark Coca-Cola and its business and a tabulation of the enormous advertising and sales of Coca-Cola.

Schedule II. The use of the abbreviation Koke and the nickname Dope, and their exclusive application to Coca-Cola.

Schedule III. The distinctiveness of the red barrel in which Coca-Cola is invariably shipped.

Schedule IV. The distinctive color and taste of Coca-Cola.

Schedule V. The suggestion of the salesmen of the Koke Companies to dealers that their product can be sold as and for Coca-Cola.

Schedule VI. The evidence that the Koke Companies' product is in fact sold as and for Coca-Cola.

Schedule VII. The evidence of the actual and deliberate fraudulent intent of the Koke Companies to pirate upon the reputation of Coca-Cola and infringe the rights of The Coca-Cola Company.

II.

Brief of Law and Authorities.

The General Rule of Law to be Applied.

The courts in the Ninth Circuit have always and from the very beginning enforced an enlightened standard of trade morals. They have always been quick to detect and reprobate practices by which unscrupulous traders have attempted to filch the business of their successful competitors. The means by which this is sought to be accom-

plished are of no consequence and in the decisions in this circuit the facts are as diverse as the devices which the ingenuity of the dishonest schemer could concoct.

The following cases show the adaptability of equity and the disposition and ability of the courts in this circuit to circumvent such parasitic activity. They include injunctions against the deceptive use of descriptive names, grade names, imitation of package, approximation of labels, simulation of identifying descriptions, distribution of imitation labels by label makers, refilling of genuine bottles with spurious goods, and oral passing off and substitution. In short, the courts of this circuit have invariably adapted themselves to the trade situation and stopped the fraud wherever found and however manifested.

In *Coleman v. Flavel*, 40 Fed., 854, Judge Deady said (856):

“The only purpose the defendants can have in using the plaintiffs’ part of this label is to avail themselves of the reputation the plaintiffs have established in the markets of the world, as dealers in canned salmon; and, even if their fish were in all respects equal to those sold by the plaintiffs, still they would, by means of false representations as to the plaintiff’s agency in the matter, so far divert or appropriate the good will of plaintiffs’ business, that has cost them time, money and good conduct to establish.

However, the fact is the defendants’ use of this label—at least, the agency part of it—on the fish in question involves a false and fraudulent representation calculated and intended to deceive the public, and injure the plaintiffs, by palming off on the former, in the name of the latter, an inferior article of salmon for a superior one. The defendants are not only seeking, by this means, to appropriate or trade on the good will of the plaintiffs’ business, but their conduct tends inevitably to injure or destroy such business.”

In *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed., 296, Mr. Justice McKenna said (297) :

“Its first and almost exact imitation of complainant’s packages and device showed, not the advertisement of a new article with a reputation yet to make, but the counterfeiting of an old article with a reputation already made; and the change in the device was and is an attempt to preserve the deceit, and yet avoid liability for it.

But respondent urges that the words ‘Syrup of Figs’ are descriptive, and that complainant deceives when it uses them to designate its compound. The deceit does not appear on the face of the bill, and it is unimportant if they are descriptive. The question is now, not whether complainant has the exclusive right to use the words ‘Syrup of Figs’ or ‘Fig Syrup,’ but it is whether respondent has, by use of them and other words, and by the other imitations alleged and exhibited, so far imitated the form of complainant’s device and description to represent its goods as its goods, and appropriate its reputation and trade. The gravamen of the action is the simulation of complainant’s devices and the deception of purchasers. This is the principle of the best-considered cases, uniting them, notwithstanding their diverse facts. *Burton v. Stratton*, 12 Fed. Rep., 696; *Baking Powder Co. v. Fyfe*, 45 Fed. Rep., 799; *Nerve Food Co. v. Baumbach*, 32 Fed. Rep., 205; *Anonyme, etc., Societe v. Western Distilling Co.*, 43 Fed. Rep., 417.”

In affirming this case, *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed., 175, Judge Beatty, speaking for this court said (178) :

“Why, then, should they use it, or any words or phrases in similitude thereof, unless it be thereby to induce the public to believe that the goods sold by them are those manufactured or produced by the appellee; thus palming off the former as those of the latter, which the laws says shall not be done. That such has been appellants’ design we are constrained to believe when we consider the character and size of their bottles, their paper boxes, the printing on each, and other matters connected therewith; for, it

appearing that the terms used are not merely descriptive of the preparation in either case, it cannot be conceived that it was purely by accident that appellants adopted the terms and appliances they have to make known to the public, and dispose of, their goods. While there is a difference between the two, there is still such similarity as we think would lead many purchasers, the consumer, though not likely the general trade dealer—to purchase one for the other. It is against the probability of such impositions upon the consuming class of the public that courts will extend their protection. ‘What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applied to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled.’ *McLean v. Fleming*, 96 U. S., 251.

As we construe the restraining order of the court below, it simply excludes the use by appellants of trade-marks, bottles, wrappers, and devices used in offering their preparation to the public similar to those applied by appellee to its preparation for a similar use and purpose. Appellants are not restrained from making their medicine, but from offering for sale or selling it under such or any circumstances, declarations, or representations that it may be taken as the preparation made and offered to the public by the appellee.”

These decisions on the point to which they are here cited, are in now way modified by *California Fig Syrup Co. v. Worden*, 187 U. S., 516.

In *Hennessy v. Herrmann*, 89 Fed., 669, Judge Hawley enjoined the sale of imitation labels which were designed to be used as an aid in palming off spurious brandy as Hennessy’s, saying (670):

“It is not essential that respondents should be engaged in manufacturing the labels referred to, although it would certainly be proper, if it be a fact, to so aver. The real question is whether or not they

have knowingly put into the hands of the dealers of the goods, by the sale of the labels, the means of deceiving the ultimate purchasers of the brandy. All persons in any way connected with the infringement of a trade-mark are responsible to the owner for the injury done to his rights."

In *Fairbank v. Luckel*, 102 Fed., 327, this court enjoined the use of the words "Gold Drop" as a name for washing powder as an infringement of "Gold Dust," Judge Hawley observing (330):

"Upon these general facts, without entering into details, we pass to the legal questions involved herein. It is assigned as error that 'the court erred in adjudging and decreeing that the name "Gold Drop" used by the defendant does not infringe upon the trade-mark and trade name "Gold Dust" of this complainant, and does not deceive the trade and consumers to the detriment of complainant,' and that the court erred in refusing to enter a decree in favor of complainant enjoining respondent from the commission of certain acts as prayed for in the bill of complaint. In many of the decided cases it has been held that the respondent ought not to be held liable for the imposition or fraud of the merchants or shopkeepers or their assistants in palming off upon the innocent public his goods as those of another. As an abstract proposition, this may be conceded to be correct; but it falls far short of being the only view of the case. The controlling question is whether or not the respondent has 'knowingly put into the hands of the retail dealer the means of deceiving the ultimate purchasers.' *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A., 554, 77 Fed., 869, 878, and authorities there cited; *New England Awl & Needle Co. v. Marlboro Awl & Needle Co.* (Mass.), 46 N. E., 386; *Von Mumm v. Frash* (C. C.), 56 Fed., 830, 838. The fact that 'Gold Drop' was sold to retail dealers for a less price furnished an incentive and inducement to retail dealers to dispose of 'Gold Drop' instead of 'Gold Dust,' as they thereby gained a greater profit for themselves."

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(331):

“The trade name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for ‘Gold Dust’ without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name ‘Gold Dust,’ by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name ‘Gold Drop,’—‘on account of its being short; good for advertising, and easy to remember.’

Many precautions were taken by respondent to avoid imitating complainant’s label. Is it not peculiarly significant that no efforts whatever were made in this direction with reference to the selection of a name totally dissimilar from that of ‘Gold Dust’? Why was ‘Gold Drop’ selected? There were plenty of other names that were short and easy to remember. Other manufacturers of washing soap had found no difficulty in this regard; for instance: ‘Pearline’; ‘Babbit, 1776,’ etc. When these facts are considered, is it not reasonably clear that in selecting ‘Gold Drop,’ which conveys to the mind so close an imitation of ‘Gold Dust,’ that there was some intention or design upon the part of respondent to impose ‘Gold Drop’ upon the public as that of ‘Gold Dust,’ or, at least, to obtain some advantage or benefit from complainant’s advertised trade name ‘Gold Dust’? Was not this result accomplished whether so intended or not?”

In *Hostetter v. Martinoni*, 110 Fed., 524, Judge Morrow issued an injunction against the sale in bulk and in demi-

johns labeled "H. Bitters," of imitation bitters as Hostetter's bitters, saying (525):

"With regard to the first contention of the defendant, whether the names by which complainant's preparation are known to the trade are merely descriptive or not, the complainant's rights to the benefits arising from the high reputation of the preparation designated by such names, gained by the efforts of complainant and its predecessors through many years, is undoubted. It is a fundamental principle of the law that one cannot make use of a reputation which another has acquired in a trade name or mark for the purpose of deriving such advantage in the manufacture and sale of the goods as arises from the good will and reputation of the original manufacture. Courts demand a high order of commercial integrity in the use by competitors of a name under which a rival has gained a business reputation, whether that name is strictly a trade-mark or is descriptive of quality merely, and frown upon all filching attempts to obtain the reputation of another. *Fuller v. Huff*, 43 C. C. A., 453, 104 Fed., 141, 51 L. R. A., 332, and cases cited. Did, then, the defendant wrongfully attempt to use the reputation of complainant's preparation for his own advantage?"

In *Van Hoboken v. Mohns & Kaltenbach*, 112 Fed., 528, Judge Morrow enjoined the refilling of empty gin bottles bearing the distillers' monogram even though the genuine paper label and stamp on the cork were not used, saying (530):

"A fundamental principle in the law of trade-marks is the protection of the owner of the trade-mark against fraud in its use by others. This fraud may consist in such use of a trade name or mark as to induce purchasers to believe that they are obtaining the article which has won reputation under the particular name or mark. It has been held that, even where a geographical name has been adopted and claimed as a trade-mark and become a well-known sign and synonym for superior excellence, its use will not be permitted by persons residing at other places for the purpose by fraud and false rep-

resentation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up.”

(531):

“If we consider the case as one of unfair competition, the same result must follow. As was said in the various Hostetter cases (C. C.), 84 Fed., 333, 107 Fed., 705, and 110 Fed., 524, the doctrine of unfair competition rests upon the proposition that men must be honest in their business transactions, and rely upon the merits of their own goods, and not undertake to palm off inferior goods as and for the goods of the genuine manufacturer. Even if the respondent in the case at bar was using the bottles of complainants as a mere convenience, without dishonest motives, the custom of refilling receptacles bearing distinctive trade names or marks with other manufacturers is too dangerous, and allows too great an opportunity for fraud against the owners of valuable preparations, to be permitted.”

In *Keuffel v. Crocker*, 118 Fed., 187, defendant imitated a series of grade names long used by the complainant and approximated the shapes and styles of complainant's packages extensively employed as designations and dress for draughting materials. Judge Morrow said (189):

“Upon the evidence now before the court, therefore, the complainant must be presumed to have established the high reputation of its goods, in connection with which the trade names used by it were of considerable value. The defendant, then, entering the field of competition, when the complainant's goods were in this situation, appears to have acted with design in the adoption of labels of general design and appearance in imitation of those used by the complainant, including the selection of similar names for the description of like goods. The complainant's goods had become known to the eye by the form of package (consisting of a roll), the peculiar color of the outside wrapper inclosing this package, and the distinctive label describing the contents.

These labels were alike for the different varieties of paper, differing only in the name describing the particular kind. It required a second glance to distinguish the particular name upon each package, while the general effect of the label as a whole was easily comprehended at the first glance. Every feature of this style of wrapping and marking was apparently copied by the defendant, with the result that close scrutiny was required to distinguish its packages from those of the complainant. Such use of names, labels and wrappers was undoubtedly infringement, and the sale of such goods so wrapped, labeled, and marked was unfair competition."

* * * * *

(190):

"The law applicable to this case may be stated in a few words. It requires the defendant, in offering his goods to the public, to use such method of wrapping, labeling and cataloguing of his packages as not to lead an intending purchaser, of ordinary intelligence, using ordinary care, into the mistaken belief that he is purchasing goods placed upon the market by the complainant, when in fact he is purchasing the defendant's goods. The defendant does not appear to have observed this requirement, and the complainant is, therefore, entitled to the protection of a temporary injunction. It is immaterial that the defendant has changed the form of its label since this action was commenced. The complaint is directed against the acts of the defendant committed prior to the commencement of the action."

In *Enoch Morgan's Sons v. Whittier-Coburn Co.*, 118 Fed., 657, defendant, in an attempt to compete with Sapolio, called his scouring soap "Sapho," approximated the shape and size of complainant's cakes and simulated its labels. Judge Morrow said (661):

"The word 'Sapho,' commencing and ending with the same letters as 'Sapolio,' and arranged in the same position upon the packages of soap, presents so similar an appearance to the eye in an ordinary glance that, in my opinion, it could easily be mis-

taken for 'Sapolio.' A minute and careful inspection will, of course, reveal the fact that it is a different preparation; but, in legal contemplation, infringement occurs when 'the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives.' *McLean v. Fleming*, *supra*; *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.*, 80 Fed., 105, 25 C. C. A., 314; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S., 19, 41, 21 Sup. Ct., 7, 45 L. Ed., 60.

While it is true that no one has a monopoly of form, of color, or of the shape of letters, it has repeatedly been held that one may not use the color that another has selected as a distinguishing mark of his goods, or use the same arrangement of letters and of marks, when such use is with the design to market his goods as the goods of another. *Hires Co. v. Consumers' Co.*, 100 Fed., 809, 41 C. C. A., 71. It is within the discretion of the court to enjoin such an imitation of another's goods, when it is proven directly or by strong inferential evidence that the imitation was willfully made, or when such imitation, even though innocently made, results in damage to the one whose rights are infringed. In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by the design of the dealer. And, though there is no evidence connecting such dishonest dealing with the defendant in any way, the fact that it so dresses its goods as to give an easy opportunity to the unscrupulous dealer to delude the consuming purchaser is very persuasive evidence that an intention existed to enter into competition with the manufacturer whose goods were already well established, and to carry on such competition in a manner which courts of equity hold to be unfair."

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(662):

"It follows that the rights of the complainant in and to its trade name are infringed by the acts of the defendant, and that the imitation of complain-

ant's packages by defendant is unlawful, in that it tends to create confusion in the trade, and work a fraud upon the public by inducing it to accept the goods of defendant for those of complainant."

In *Kostering v. Seattle Brewing & Malting Co.*, 116 Fed., 620, this court enjoined an imitated beer label. Judge Gilbert, after comparing the two, used the following language (621):

"These differences are such as are usually introduced where the intention is to make an unfair use of an established trade-mark, and at the same time so far depart therefrom as to avoid the charge of infringement. It is argued, and it is true, that the differences are apparent to anyone who will read and examine the labels, but that argument does not meet the question which the case presents: Are the resemblances between the two labels such that the consumer is likely to be misled? We have no hesitation in saying that they are, and that the variations are wholly insufficient to avoid the charge of infringement, or create a doubt that the label of the appellant was copied from that of the appellee, and was made in close imitation of all its salient features. A consumer who has been accustomed to purchase an article in a dress or a package which has become familiar to him does not stop to read and examine. Many of the consumers of beer are unable to read, and many are foreigners, and unacquainted with the English language. All consumers, whether able to read or not, are in fact guided by the general appearance of the package or label which is before them. The general appearance of the beer bottles, carrying these two respective labels, is strikingly similar. No argument can add force to the conviction which is produced by the mere sight of them. *Collinsplatt v. Finlayson* (C. C.), 88 Fed., 693; *Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A., 554, 77 Fed., 869; *Biscuit Co. v. Baker* (C. C.), 95 Fed., 135."

In *Standard Varnish Works v. Fisher*, 153 Fed., 928, there was involved the alleged deceptive use of the name

“Turpentine Shellac.” Judge Wolverton overruled a demurrer, saying (930) :

“As a trade name, it may be properly so employed, but within itself it is inapt for exclusive appropriation as a trade-mark. Beyond this, however, words or symbols naturally descriptive of the product, while not adapted for exclusive use as a trade-mark, may yet acquire, by long and general usage in connection with the preparation and by association with the name of the manufacturer, a secondary meaning or signification, such as will express or betoken the goods of that manufacturer only, and in this sense he will be entitled to protection from an unfair use of the designation or trade name by others that may result in his injury and in fraud of the public.

The principle that one person or firm should not sell his goods as the goods of another person or firm lies at the bottom of the legal objection, and it is the making use of the trade name, which by a peculiar and particular signification betokens the goods of a particular manufacturer, for the purpose of foisting the goods of another, especially if they be of inferior stamp or quality, upon the market as the goods of that manufacturer, that the law will not tolerate. Such a practice is unfair and injurious both to the proprietor or manufacturer and to the public.”

Judge Wolverton, speaking for this court, in *G. Heileman Brewing Co. v. Independent Brewing Co.*, 191 Fed., 489, a case involving imitation of beer labels, remarked (492) :

“A suit for unfair competition may be maintained where there is no lawful trade-mark involved, which consists essentially in palming the goods of one manufacturer or vendor off for the goods of another. This is a fraud not only upon the manufacturer whose goods are assimilated and replaced in the market, but upon the general public as well, which does not get what it supposes it is bargaining for. For the fraud thus perpetrated, the individual or the manufacturer, as the case may be, has his or its cause of suit to prevent the recurrence of the im-

position, and for such damages as may have been sustained on account of it.”

* * * * *

(494) :

“The last and cardinal contention is that the label used by the defendant is not an infringement upon complainant’s trade-mark. A simple inspection of the two labels, as shown by Exhibits A and C attached to the complaint, convinces one that the defendant’s label was suggested by that of complainant, which latter consists essentially, as is alleged in the complaint, of a conventional or typical Dutch or German scene, and the situation is really resolved into the question whether the defendant has so differentiated its label in the manner of its design and detail of execution as to avoid infringement of complainant’s label. There is a manifest effort at artful simulation to be attended with barely sufficient differentiation to escape infringement. Has the defendant succeeded, and does the complaint so show upon its face?”

After describing the two labels, Judge Wolverton concludes (497) :

“Now, to one scanning the detailed description of these two Dutch scenes, or laying the pictures side by side, there could be no trouble in distinguishing the one from the other. But this is not the test. Will confusion result to the purchasing public by the use of the two not brought into direct or special comparison? Would the ordinary customer applying at the counter for ‘Old Style Lager,’ observing the care customary with purchasers in that way, be likely to be deceived or misled into buying ‘Old German Lager,’ if it was offered him marked with defendant’s label? We are impressed that he would.

A simulation of the most prominent and distinctive features of the complainant’s label, is found in the defendant’s label. The inn is there, with the legend in slightly different wording suspended from a scroll; the representation of men drinking at a table outside of the inn is there; the barrels or casks in the subway are there; the monks drinking at a table at or near the casks are there; and the coopering of a barrel

is there. In short, the 'ensemble' is there, and that, says the court in *Cantrell & Cochrane v. Butler*, *supra*, does the mischief. And quoting again:

'The usual purchaser neither abstracts nor analyzes for the purpose of differentiation and judgment.'

The complaint, fairly construed, we think, shows infringement upon the face of it. What the evidence may show at the trial is quite a different thing."

In *Weinstock v. Marks*, 109 Cal., 529, 42 Pac., 142, complainant operated a store of peculiar architecture in Sacramento. He called his establishment "Mechanics' Store." Defendant, next door, erected a building of similar architecture, to which he applied the name "Mechanical Store." Judge Garroute, speaking for the Supreme Court, said (145):

"Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there was no relief. This cannot be so, for the whole law of trade-marks, trade names, etc., is recognized, approved and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that 'no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and

eluded by new schemes which the fertility of man's invention would contrive.' By device, defendant is defrauding plaintiff of its business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader."

* * * * *

"We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive."

* * * * *

"In the leading case of *Lee v. Haley, supra*, the whole question is condensed by the final conclusion of the court into the principle of law 'that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person.' If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, 'If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?' Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade names. They reach away beyond that,

and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent."

In *Banzhaf v. Chase*, 150 Cal., 180, 88 Pac., 704, it was sought to protect the name "Old Homestead" for bread. Justice Shaw remarked (705):

"The case of the plaintiffs does not depend on its right to the exclusive use of the words in question. It is based on fraud. It rests on the right of the plaintiffs to restrain the conduct of the defendant whereby he, in order to injure the plaintiff and benefit himself, simulates the plaintiffs' goods, deceives the plaintiffs' patrons into the belief that his bread is that made by the plaintiffs and thereby induces them to buy his own bread instead of the plaintiffs', thus, by fraud and deception, depriving the plaintiffs of the profits of such sales and appropriating the same to his own use. The right to prevent such an injury by injunction does not depend on the ownership by the plaintiffs of any particular word, phrase, or device, as a trade-mark. If the words in question constituted a trade-mark of the plaintiffs, as defined by law, and the defendant was using it to plaintiffs' injury, he would be restrained, although he were in entire ignorance of plaintiffs' prior use, or right, and were using it in good faith, with good motives, with no intent to injure any person, and no consciousness of such injury. But where one purposely imitates the goods, signs, or place of business of another, in order, by deceiving the other's patrons, to sell his own goods as the goods of the other, and thereby obtain for himself the profits which would otherwise go to the other, it is not necessary that the devices, words, or signs which are imitated shall constitute a trade-mark. The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law regulating trade-marks, or of the ownership of such trade-mark by the plaintiffs. The gist of such an action is not the appropriation and use of another's trade-

mark, but the fraudulent injury to, and appropriation of, another's trade."

The net result of the foregoing cases is that unfair trading is a question of fact. The rule of law is general and without exception—that nobody has any right to represent his goods as the goods of somebody else—it does not make any difference how the representation may be made. It is the question of fact, whether the false representation is being made with which the court is concerned, and if this fact appears from the evidence, relief will be accorded and the efficient means by which it is accomplished will be enjoined.

This rule was accepted and applied by the court below in this case. Judge Sawtelle found as a fact that the Koke Companies were intentionally and purposely endeavoring to pirate the Coca-Cola Company's business and sell their product as and for Coca-Cola; that they intentionally adopted means which they knew would accomplish this purpose, and that these means did in fact accomplish it; that the Koke Company's goods, when sold under the names Koke and Dope, were sold as and for Coca-Cola. Judge Sawtelle thereupon entered a decree which stopped the fraud, and unless this court is prepared to reverse a long line of decisions which it has made, enjoining practices much less flagrant than those which the record here discloses, it necessarily follows that the decision of the court below must be affirmed.

Judge Sawtelle has well summarized the principle by which cases of this description are decided.

In *Coca-Cola Co. v. The Koke Company of America et al.*, 235 Fed., 408, 411, he said:

"Numerous authorities have been cited by both sides, with variant facts, but as each case must be determined on all facts that surround it, the facts in any prior case cannot be a guide to the decision of

the subsequent. This view is cogently pointed out on page three of lectures of John Cutler, of King's College, entitled 'Passing Off.'

The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated: 'no man has a right to pass off his goods as though they were the goods of another.'

'The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another.' "

Canal Company v. Clark, 13 Wall., 311.

"The difficulties which arise are in the application of this principle to the facts of the particular case, and the question which the court has to decide is always a question of fact. The decision of the court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be considered in arriving at a conclusion."

The particular means by which the Koke Companies perpetrate the fraud and accomplish the sale of their goods as and for Coca-Cola are the use of the nicknames by which Coca-Cola is known and by imitating the visual appearance of Coca-Cola, its labels and containers.

The use of the nicknames is the principal offense but the imitation of label, barrel and drink itself are efficient aids in the scheme of fraud. As Judge Sawtelle observed:

"The witness Wright of the Southern Koke Company justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words were an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

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In view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness.’’

The imitation of the characteristic script in which the word Coca-Cola is always printed, the red barrel invariably used as a container for Coca-Cola syrup and the duplication of the appearance of the drink have their counterparts in *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720 (C. C. A., Sixth Circuit), where Judge Denison said:

“Complainant also asks that the injunction extend to the use of the barrels or kegs painted of the same color as complainant’s, and to coloring the product itself with the same color, and to using any packages not plainly marked Gay Ola. Whether the injunction should have this scope must be considered.

It is first to be observed that defendant is at the best on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the ‘trade-mark’ names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or bad faith is the criterion, and their presence puts upon the user a burden of care to see that deception does not naturally result. Conversely, when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying acts, and some which otherwise might be innocent become guilty. So here. The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was exclusive

in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant's scheme of fraud. So, too, with defendant's failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden.

The question remains whether the injunction should go to the extent of forbidding defendant to sell Gay Ola with the identical color it now has—that is, to forbid its sale unless colored so as to distinguish it from Coca-Cola. Defendant contends that such a prohibition is inconsistent with its legal right to make and sell an article which is in fact exactly like Coca-Cola. This contention seems unpersuasive in view of defendant's pleading. In its answer, it has abandoned the claim of its advertising literature that Gay Ola is made exactly according to the Coca-Cola formula, and urges that its product is a different and better compound. It says that it has improved upon the formula of Coca-Cola, while eliminating one of the elements, and that its product is 'greatly superior' to Coca-Cola. It thus destroys a considerable part of the foundation, upon which rests its claimed right to adopt a color which will be deceptive; but we pass by this consideration.

The record justifies the conclusion that the color is 'Non-functional'—to use the phraseology of the patent law. The bill alleges that Gay Ola is 'artificially and unnecessarily' colored so as to look exactly like Coca-Cola. The answer denies this in terms, but it goes on to say that the color is produced by caramel which is in universal use for coloring purposes and is used by complainant for coloring Coca-Cola. There is here no claim that caramel serves any other purpose in either compound, except merely to give color, and saying that it is one of the 'component elements,' as one of the witnesses does, is saying nothing more. It follows that the adoption not only of caramel but of the selected

amount of caramel was for the main and primary purpose of making the two articles look just alike. In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers.

The record also requires the conclusion that defendant's business had a substantial basis in this contemplated fraud. Doubtless it intended to try to make a reputation and business for Gay Ola on its own merits in certain quarters, and perhaps eventually in a general way; but it is clear that in the meantime, and wherever it could, and as the easiest way of getting a large business, it intended to have its product sold as and for Coca-Cola. Under these circumstances, we need not consider what the rule would be if the color was the incidental result of an ingredient used for some other purpose, nor yet what the rule would be if the defendant had adopted ever a wholly unnecessary identity in color in connection with a good-faith effort to sell its own goods on their own merits. This court has not yet said that a case of fraudulent competition can be made out solely by proof of identity in a nonfunctional particular. *Rathbone Co. v. Champion*, *supra*; *Hilker Mop Co. v. U. S. Mop Co.*, 191 Fed., 613, 112 C. C. A., 176. This case is not even one of imitating matters of appearance in an article of common manufacture, like furniture. *Globe-Wernicke Co. v. Macey Co.*, 119 Fed., 696, 704, 56 C. C. A., 304. We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and that, so far as defendant cannot safeguard this result, it may not use the color. There is here marked—indeed, close—analogy to the rule of *Westinghouse Co. v. Wagner Co.*, 225 U. S., 604, 32 Sup. Ct., 691, 56 L. Ed., 1222, and to the rule which requires an article which is likely to deceive as to its origin to be distinctly tagged with

the name of the real producer. *Merriam v. Saalfeld, supra*. It goes without saying that this tag should be in form adapted to reach the notice of the final purchaser.

As to the bottling part of the output, defendant could apparently provide reasonably efficient means of notice, and so probably prevent deception by seeing to it that all the bottles were stamped and labeled prominently with the name of its product. As to the soda fountain part of the output, we do not at present see how deception could be efficiently prevented, save by giving the product a nondeceptive color, although some other satisfactory means may be brought to the attention of the court below. The defendant should be enjoined from selling Gay Ola of a color the same as or substantially similar to Coca-Cola, unless and in so far as upon settlement of the decree below means may be provided by which the ultimate consumer will be fairly advised that he is not getting complainant's Coca-Cola, but is getting something else."

On settlement of the decree see:

Coca-Cola Co. v. Gay-Ola Co., 211 Fed., 942.

That the name Coca-Cola is a valid trade-mark is shown by the following cases:

Coca-Cola Co. v. American Druggists Syndicate,
200 Fed., 107.

Coca-Cola Co. v. Deacon Brown Bottling Co.,
200 Fed., 105.

Coca-Cola Co. v. Nashville Syrup Co., 200 Fed.,
153, 157; 215 Fed., 527.

Coca-Cola Co. v. Virginia Syrup Co., 3 T. M.
Rep., 126.

Coca-Cola Co. v. J. G. Butler & Sons, 229 Fed.,
224.

Coca-Cola Co. v. Koke Co., 235 Fed., 408.

Coca-Cola Co. v. Bennett, 238 Fed., 513.

It is the universal rule that it is of no consequence by what means passing off and fraud are effectuated. It is the result, the actual passing off, however accomplished, that courts of equity prevent by enjoining the efficient means.

Burgess v. Burgess, 3 De G. M. & G., 896.

Reddaway v. Banham, 1896, A. C., 199, 13 R. P. C., 224.

Powell v. Birmingham Vinegar Brewery Co., 1897, A. C., 710, 14 R. P. C., 727.

Dennison v. Thomas, 94 Fed., 651, 656.

A. G. Spalding & Bros. v. Gamage, 32 R. P. C., 273.

Shaver v. Heller, 108 Fed., 821, 827.

Thompson v. Montgomery (1891), A. C., 217, 6 R. P. C., 404, 407, 8 R. P. C., 361, 365.

In determining whether or not a false representation is made, the ultimate purchaser is the person considered and any device or artifice which may be calculated to deceive the ordinary, inattentive buyer is unlawful.

Liggett & Meyer v. Hynes, 20 Fed., 883, 885.

Liebig's Extract of Meat Co. v. Chemists Co.-Op. Soc., 13 R. P. C., 635, 644, 736.

Florence Co. v. Dowd, 178 Fed., 73, 75.

Cauffman v. Schuler, 123 Fed., 205, 206.

Bissell v. Bissell, 121 Fed., 357, 365.

Blackwell v. Armistead, 3 Hughes, 163; F. C., 1474, p. 548.

Scriven v. North, 134 Fed., 366, 379.

Pillsbury v. Pillsbury, 64 Fed., 841, 847.

Birmingham Small Arms Co., Ltd., v. Webb, 24 R. P. C., 27, 31.

Any word or name, whatever its original character or its primary significance, which by association has ac-

quired an understood meaning identifying the goods of a certain producer, will be protected against imitation.

Wotherspoon v. Currie, L. R., 5 House of Lords, 508; 27 Law Times (N. S.), 393.

Lee v. Haley, 21 L. T. (N. S.), 546; L. R., 5 Ch., 155; 22 L. T. (N. S.), 251.

Thompson v. Montgomery, 6 R. P. C., 404, 407; 8 R. P. C., 361, 365 (1891), App. Cas., 217.

Reddaway v. Banham (1896), A. C., 199; 13 R. P. C., 218.

Reddaway v. Ahlers, 19 R. P. C., 12.

Reddaway v. Stevenson, 20 R. P. C., 276.

Reddaway v. Frictionless Packing Co., 19 R. P. C., 505.

Reddaway v. Irwell, 23 R. P. C., 621.

The Yorkshire Relish case (*Powell v. Birmingham Vinegar Co.*, 13 R. P. C., 235 (1894), 3 Ch. Div., 449 (1894), 3 Ch., 462 (1896), 2 Ch., 54 (1897), App. Cas., 710, 14 R. P. C., 720.

The English courts have consistently adhered to this doctrine, as is shown in the "Silver Pan" jam case (*Faulder v. Rushton*, 20 R. P. C., 477), and in the cases of *North Cheshire Brewing Co. v. Manchester Brewery Co.* (1899), App. Cas., 83; *Saxlehner v. Apollinaris Co.* (1897), 1 Ch., 893; 14 R. P. C., 645; the "Horse Shoe" boiler case, *Kinnell v. Ballantine*, 26 R. P. C., 12; 27 R. P. C., 185; the "Slip on" coat case, *Burberrys v. Raper*, 23 R. P. C., 170; the "Chartreuse" case, *Rey v. Lecouturier*, 25 R. P. C., 265, 284; 27 R. P. C., 268, 278.

The courts in this country have accepted the principle of secondary meaning, among them the Supreme Court of the United States. For example: *Reddaway v. Banham* has been expressly approved in *Elgin National Watch Company v. Illinois Watch Case Company*, 179 U.

S., 665, and its doctrine stated as the law of this country in *French Republic v. Saratoga Vichy Co.*, 191 U. S., 427, 435.

This theory was accepted completely in *Shaver v. Heller & Merz*, 108 Fed., 821, where the word "American" was protected, and *Wolf v. Hamilton-Brown Shoe Co.*, 165 Fed., 413; 240 U. S., 251 (American Girl), and the doctrine is now thoroughly established in this country, as is shown by the following cases, where the word or name protected is indicated: (*Chartreuse*), *Baglin v. Cusenier*, 221 U. S., 580; (*Beecham's Pills*), *Jacobs v. Beecham*, 221 U. S., 263; (*Health Food*), *Fuller v. Huff*, 104 Fed., 141; ("Air Cushion," Rubber Horse Shoes), *Revere Rubber Co. v. Consolidated Hoof Pad Co.*, 139 Fed., 151; (*Elastic Seam Drawers*), *Scriven v. North*, 134 Fed., 366; *Scriven v. Girard*, 140 Fed., 794; (*Celery Compound*), *Wells & Richardson Co. v. Siegel, Cooper & Co.*, 106 Fed., 77; (*Elgin Watches*), *Elgin National Watch Co. v. Loveland*, 132 Fed., 41; (*Waltham Watches*), *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass., 85; 53 N. E., 141; *American Waltham Watch Co. v. Sandman*, 96 Fed., 330; (*Boston Trade Peanut Roasting Co.*), *Viano v. Baccigalupo*, 183 Mass., 160; 67 N. E., 641; (*Robe and Tanning Co.*), *Dyment v. Lewis*, 123 N. W. (Iowa), 244; (*Dr. Drake German Croup Remedy*), *Drake Medicine Co. v. Glessner*, 68 Ohio St., 337; 67 N. E., 722, 726; (*Lexington Mustard*), *Metcalfe v. Brand*, 9 Ky. Law Rep., 801, 5 S. W., 773, 779; (*Turpentine Shellac*), *Standard Varnish Works v. Fischer*, 153 Fed., 928; (*U. S. Dental Parlors*), *Cady v. Schultz*, 19 R. I., 193, 32 Atl., 915; (*Portland Stoves*), *Van Horn v. Coogan*, 52 N. J. Eq., 380, 28 Atl., 788; (*Keystone Oils*), *Buzby v. Davis*, 150 Fed., 275; (*High Standard*), *Lowe Bros. v. Toledo Varnish Co.*, 168 Fed., 627; (*Anderson Cheese Cutter*), *Computing Cheese Cutter Co. v. Dunn* (Ind.

App.), 88 N. E., 93; (Bates Numbering Machine), *Bates v. Bates*, 172 Fed., 892; (Angostura Bitters), *Siebert v. Gandolfi*, 149 Fed., 100; (Spanish Tile Cohesive Tile), *Guastavino v. Comerma*, 180 Fed., 920; (Beats All Pencil), *American Leal Pencil Co. v. Gottlieb*, 181 Fed., 178; (Keep Clean Brushes), *Florence Mfg. Co. v. Dowd*, 178 Fed., 73; (Holeproof Hosiery), *Holeproof Hosiery Co. v. Wallach Bros.*, 172 Fed., 859; *Holeproof Hosiery Co. v. Fitts*, 167 Fed., 378; *Holeproof Hosiery Co. v. Richmond Hosiery Mills*, 167 Fed., 381; (Baker's Cocoa, Baker's Chocolate), *Walter Baker & Co. v. Baker*, 77 Fed., 181; *Walter Baker & Co. v. Sanders*, 80 Fed., 889; *Walter Baker & Co. v. William P. Baker*, 87 Fed., 209; *Walter Baker & Co. v. Slack*, 130 Fed., 514; (Garrett Snuff), *Garrett v. Garrett*, 78 Fed., 472; (Royal Baking Powder), *Royal Baking Powder Co. v. R. P. Royal*, 122 Fed., 337.

Nicknames, abbreviations or short names, given by the public to a particular article, are protected against imitation to the same extent as any other identifying word or device.

Carroll v. Ertheiler, 1 Fed., 688.

Walter Baker & Co. v. Harrison, 138 O. G., 770;
1909 C. D., 284; 32 App. D. C., 272.

Saxlehner v. Apollinaris Co., 14 R. P. C., 645,
652.

In re Indian Portland Cement Co., 134 O. G.,
518; (1908) C. D., 361; 30 App. D. C., 463.

In re S. C. Herbst Importing Co., 134 O. G.,
1565; (1908) C. D., 383; 30 App. D. C., 297.

Heublein et al. v. Adams et al., 125 Fed. Rep.,
782.

Ehret v. Star Brewery Co., 136 O. G., 1533;
(1908) C. D., 511; 31 App. D. C., 507.

- Summit City Soap Works v. The Standard Soap Co.*, 174 O. G., 587; (1912) C. D., 430; 37 App. D. C., 604.
- In re John Braadland, Ltd.*, 174 O. G., 1029; (1912) C. D., 432; 37 App. D. C., 602.
- In re Reisch Brewing Co.*, 188 O. G., 811; (1913) C. D., 321; 39 App. D. C., 445.
- The Ellison-Harvey Co. v. Monarch*, 128 O. G., 2530; C. D. (1907), 170.
- Ex parte The Waterproofing Co.*, 145 O. G., 255; (1909) C. D., 123.
- Ex parte The Utrecht Export Cy. Griendt Brothers, Ltd.*, 183 O. G., 784; C. D. (1912), 304.
- American Lubricating Oil Co.*, Com. Dec., 1876, 56 Newton Digest, 267.
- Hernsheim & Bros.*, 21 Pat. Off. MS. D 98; Newton's Digest, 283.
- In re Palmer*, 22 Pat. Off. MS. D 386; Newton's Digest, 292.
- In re Short, Nerney & Co.*, 54 MS. D 457; Newton's Digest, 318.
- Schrauder v. Beresford & Co.*, Pat. Off. June 27, 1872, Sebastian T. M. 131 Note (b).
- Welsbach Light Co. v. Adam*, 107 Fed., 463.
- Philadelphia Trust & Safe Deposit Co. v. Philadelphia Trust Co.*, 123 Fed., 534.
- Becker v. Gambrill*, 179 O. G., 1111; 38 App. D. C., 585; (1912) C. D., 503.
- Denver Chemical Mfg. Co. v. Lilley*, 216 Fed., 869, 870.
- White v. Miller*, 50 Fed., 277.
- Walter Baker & Co. v. Puritan Pure Food Co.*, 139 Fed., 680.
- Hutchinson v. Blumberg*, 51 Fed., 829.

- Johnson & Johnson v. Bauer & Black*, 82 Fed., 662.
- American Tin Plate Co. v. Licking Roller Mill Co.*, 158 Fed., 690.
- DeVoe Snuff Co. v. Wolff* (C. C. A., Sixth Circuit), 206 Fed., 420.
- Seixo v. Provezende*, L. R., 1 Ch., 192; 14 L. T., 314.
- Read v. Richardson*, 45 L. T. N. S., 54.
- Wilkinson v. Griffith Bros. and Co.*, 8 R. P. C., 370.
- Orr Ewing and Co. v. Johnston and Co.*, 40 L. T., N. S., 307, 309.
- In re Worthington's T. M.*, L. R., 14, Ch. D., 8; 42 L. T. N. S., 563.
- Barsalou v. Darling*, 9 Can. Sup. Ct., 681; 1 Can. Com. Law Rep., 71.
- Smith v. Fair*, 14 Ont. Rep., 729; 3 Can. Com. Law Rep., 152.
- In re Baschiera's Trade-Mark*, 33 Solr's Journal, 469.
- In the Matter of Dewhurst's Application for a Trade-Mark*, 13 R. P. C., 289.
- La Societe Anonyme des Verreries de l'Etoile*, 11 R. P. C., 142.
- Curtis & Harvey v. Pape*, 5 R. P. C., 146.
- Price's Patent Candle Co. v. Jeyes' Sanitary Compounds Co.*, 19 R. P. C., 17.
- The Upper Assam Tea Company v. Herbert*, 7 R. P. C., 183.
- In the Matter of Currie & Co.'s Application for a Trade-Mark*, 13 R. P. C., 681.
- Re Barker's Trade-Mark*, 53 L. T., N. S., 23.
- Anglo-Swiss Condensed Milk Co. v. Metcalf*, 3 R. P. C., 28.

- Hodgson and Simpson v. Kynoch, Ltd.*, 15 R. P. C., 465.
- Cartier v. Carlile*, 31 Beav., 292.
- Cartier v. May*, July 12, 1861, Wood, V. C., Cox Man., 200.
- Edelsten v. Edelsten*, 1 DeG., J. & S., 185; 7 L. T. N. S., 768.
- Henderson v. Jorss*, June 21, 1861, Wood, V. C., Cox Man., 198.
- Standish v. Whitwell*, March 9th, 1856, Wood, V. C., 14 W. R., 512.
- Dixon v. Jackson*, 3 Ser., Scottish Sess. Cas., v. 326.
- In the Matter of the Application of Pomril, Ltd., for a Trade-Mark*, 18 R. P. C., 181.
- Boord v. Huddart*, 21 R. P. C., 149.
- Moses v. Sargood*, Cox Man., 636.
- Cartier v. Westhead*, Cox Man., 199.
- In re Jelley Sons & Jones*, 51 L. J. Ch., 639.
- In re Whitely*, 43 L. T. (N. S.), 627.
- In re Rabone*, Cox Man., 643.

The imitation by the Koke Companies of the Coca-Cola script and bottle labels is unfair and enjoinalbe.

- Saxlehner v. Eisner*, 179 U. S., 19.
- W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 62 Atl., 499, 504.
- Godillot v. American Grocery Co.*, 71 Fed., 873.
- Cusimano v. Oil Co.*, 114 La., 314; 38 So., 200.
- Liggett v. Hynes*, 20 Fed., 883, 885.
- Smith v. Carron*, 13 R. P. C., 109, 111.
- Perry v. Truefitt*, 6 Beav., 66.
- Croft v. Day*, 7 Beav., 84.
- Woollam v. Ratcliff*, 1 H. & M., 259.
- Frese v. Bachof*, 14 Blatchf., 432; F. C., 5110.

- Wellman & Dwire T. Co. v. Ware Tobacco Works*, 46 Fed., 289.
- Fischer v. Blank*, 33 N. E., 1040; 138 N. Y., 244.
- Amoskeag Co. v. Spear*, 2 Sandf. Supp. Ct., 599, R. Cox, 87, 95.
- Paris Medicine Co. v. Hill*, 102 Fed., 148, 150.
- Blackwell v. Armisted*, F. C., 1474, p. 548.
- Bickmore Co. v. Karns*, 134 Fed., 833, 835.
- Cantrell & Cochrane v. Butler*, 124 Fed., 290, 291.
- Enterprise Co. v. Landers*, 124 Fed., 923, 928.
- National Biscuit Co. v. Ohio Baking Co.*, 127 Fed., 160, 161.
- Kronthal Waters Co. v. Becker*, 137 Fed., 649, 658.
- Singer Co. v. Bent*, 163 U. S., 205.
- Kostering v. Seattle Brewing Co.*, 116 Fed., 620.
- Lalace & Grosjean Mnf. Co. v. National Enameling & Stamping Co.*, 109 Fed., 317.
- Hansen v. Siegel-Cooper Co.*, 106 Fed., 690.
- National Biscuit Co. v. Baker*, 95 Fed., 135, 136.
- Colinsplatt v. Finlayson*, 88 Fed., 693.
- Cuervo v. Owl Cigar Co.*, 68 Fed., 541.
- Liebig's Extract of Meat Co. v. Chemists' Co-Op. Soc.*, 13 R. P. C., 635.
- Kyle v. Perfection Mattress Co.*, 127 Ala., 39; 28 So., 545.
- Schendel v. Silver*, 18 N. Y. S., 1, 2.
- Lever v. Goodwin*, 4 R. P. C., 492, 502.
- Barlow v. Johnson*, 7 R. P. C., 395, 407.
- Pillsbury v. Pillsbury*, 64 Fed., 841, 846.
- McLean v. Fleming*, 96 U. S., 245.
- Sawyer v. Kellogg*, 7 Fed. Rep., 721; 9 Fed. Rep., 601.
- Battle v. Finley*, 45 Fed. Rep., 796.

- Fairbank Co. v. Bell*, 77 Fed. Rep., 869.
Fischer v. Blank, 138 N. Y., 244, 251, 252.
Johnson v. Bauer, 82 Fed. Rep., 662.
Pillsbury v. Eagle, 86 Fed. Rep., 608.
Raymond v. Royal Baking Co., 70 Fed. Rep., 376;
 85 Fed. Rep., 231.
Meyer v. Bull, 58 Fed. Rep., 884.
Le Page v. Russia Cement Co., 51 Fed. Rep.,
 941.
Taylor v. Taylor, 23 L. J. Ch., 255.
Little v. Kellam, 100 Fed. Rep., 353.
Dreydoppel v. Young, 14 Phila., 226.
Croft v. Day, 7 Beav., 84.
Hansen v. Siegel-Cooper Co., 106 Fed., 690.
Stuart v. Stewart Co., 85 Fed., 778.
Cauffman v. Schuler, 123 Fed., 205.
Upper Assam Tea Co. v. Herbert, 7 R. P. C.,
 183.
Seixo v. Provezende, L. R. 1 Ch., 192, 195.
National Water Co. v. O'Connell, 159 Fed., 1001,
 1003.

The imitation of the red Coca-Cola barrels is unfair and enjoinable.

- Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720; 211
 Fed., 942.
Hildreth v. D. S. McDonald Co., 164 Mass., 16;
 41 N. E., 56.
Franck v. Frank Chicory Co., 95 Fed., 818.
Cohen v. Delavina, 104 Fed., 946.
Ohio Baking Co. v. National Biscuit Co., 127
 Fed., 116, 121.
R. J. Reynolds Co. v. Allen Tobacco Co., 151
 Fed., 819.
Garrett v. Garrett, 78 Fed., 472.

- Fairbank v. Bell*, 77 Fed., 869, 976.
Kronthal Waters v. Becker, 137 Fed., 649.
N. E. Aul Co. v. Marlboro Co., 168 Mass., 154;
 46 N. E., 386.
National Water Co. v. O'Connell, 159 Fed., 1001;
 161 Fed., 545.
Wright v. Blezard, 27 R. P. C., 299, 303.

The imitation of the visual appearance of Coca-Cola is unfair and enjoined.

- Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720;
 211 Fed., 942.
Hiram Walker & Sons v. Grubman, 222 Fed.,
 478.
Kyle v. Perfection Mattress Co., 127 Ala., 39;
 28 So., 545.
Liggett v. Hynes, 20 Fed., 883.
Rey v. Lecouturier, 27 R. P. C., 268, 278.
Plant v. May Co., 100 Fed., 72, 76.
Bickmore Gall Cure Co. v. Karns, 134 Fed., 833,
 834.
Fonotipia Co. v. Bradley, 171 Fed., 951.
Potter v. McPherson, 21 Hun. N. Y., 539; P. &
 S., 374, 381.
Scriven v. North, 134 Fed., 366, 373.
Howard Dustless Duster Co. v. Carleton, 185
 Fed., 999, 1000.
Sterling Remedy Co. v. Spermine Medical Co.,
 112 Fed., 1000.
Globe Co. v. Brown, 121 Fed., 90.
Rushmore v. Saron, 158 Fed., 499.
Frost v. Estes, 156 Fed., 677; 176 Fed., 338.
Keystone Type Foundry v. Portland Pub. Co.,
 180 Fed., 301.

Enterprise Manfg. Co. v. Landers, Frary & Clark (C. C. A., Second Circuit), 131 Fed., 240.

Fox v. Glynn, 91 Mass., 344; 78 N. E., 89.

Fox v. Hathaway, 199 Mass., 99; 85 N. E., 417.

Weinstock v. Marks, 109 Cal., 529; 42 Pac., 142.

Buck's Stove Co. v. Kiechle, 76 Fed., 758.

Putnam Nail Co. v. Bennett, 43 Fed., 800.

Jones v. Hallworth, 14 R. P. C., 225.

R. J. Elliott & Co. v. Hodgson, 19 R. P. C., 518.

Allen v. Wallon, 178 Fed., 287.

Baldwin v. Greer Bros., 210 Fed., 560.

Flagg v. Holway, 178 Mass., 83; 59 N. E., 667.

Victor Co. v. Armstrong, 132 Fed., 711.

Rushmore v. Manhattan Screw Works, 163 Fed., 939.

Yale & Tourne v. Adler, 154 Fed., 37.

Mueller v. McDonaity, 164 Fed., 1001, 1004.

Hegeman v. Hegeman, 8 Daly, 1, 4.

Capewell Co. v. Mooney, 167 Fed., 575; 172 Fed., 826.

Moxie Co. v. Daoust, 206 Fed., 434.

The suggestion that Koke and Dope can be substituted for Coca-Cola is enjoinable.

Anargyros v. Egyptian Amasis Cigarette Co., 66 N. Y. S., 626, 627.

Pennsylvania Salt Co. v. Myers, 79 Fed., 87, 88.

Reddaway v. Banham, 13 R. P. C., 218, 224.

Huntley v. Reading Biscuit Co., 10 R. P. C., 277.

The price of Koke and Dope, which is one and the same product, to the dealer is less than Coca-Cola, while the retail price is the same. By giving the distributor

a greater profit a premium is placed on substitution and fraud.

Pillsbury v. Pillsbury, 64 Fed., 841, 849.

Wotherspoon v. Currie, L. R., 5 H. L., 508; 23 L. T. N. S., 443.

Robinson v. Storm, 103 Tenn., 40; 52 S. W., 880, 882.

Sawyer v. Horn, 1 Fed. Rep., 24.

Fairbank v. Bell, 77 Fed. Rep., 869, 877.

Pennsylvania Salt Co. v. Myers, 79 Fed. Rep., 87.

Coats v. Coates Thread Co., 135 Fed. Rep., 177, 179.

Powell v. Birmingham, 13 R. P. C., 258, 263.

Dreydoppel v. Young, 14 Phila., 226.

Fairbank v. Luckel, 102 Fed., 327, 330; P. & S., 423, 425.

The sale by the Koke Companies of their product under the names Koke and Dope places in the hands of dealers an instrument of fraud, with the suggestion conveyed by the use of the Coca-Cola nicknames of passing off as Coca-Cola makes them responsible for the result.

Samuels Bros. v. Hostetter, 118 Fed., 257.

Enoch Morgans Sons v. Whittier Coburn Co., 118 Fed., 657.

Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720.

Hostetter v. Bruggeman-Reinert Distilling Co., 46 Fed., 188.

Hostetter v. Van Vorst, 62 Fed., 600.

Hostetter v. Becker, 73 Fed., 297.

Hostetter v. Sommers, 84 Fed., 333.

Hostetter v. Brunn, 107 Fed., 707.

Hostetter v. Conron, 111 Fed., 737.

III.

The Defenses.

As these cases have progressed, various positions have been assumed by the Koke Companies. As soon as one became untenable it was abandoned and another taken without regard to consistency or candor. The Koke Companies accused in this case of fraud of a singularly mean and discreditable description have defended but have not denied. Indeed few, if any, of the acts of intentional deception of which the Koke Companies stand accused by the testimony in this record, are even explained, much less controverted. The salesmen who counselled dealers to pass off the Koke Companies imitation for Coca-Cola and "no one could tell the difference," though still in the employ of the Koke Companies, were not called as witnesses. The use of genuine Coca-Cola labels as copy for the Koke label is admitted. That there were frequent demands on the part of buyers of soft drinks for Koke and the word Koke was adopted to take advantage of that demand is admitted by Wright, formerly vice president of the Southern Koke Company, Ltd., as the reason for its appropriation, and it is confessed that the word Koke was a nickname for Coca-Cola and known to be such by the promoter of the Koke Companies (Moore) before they were organized and started business.

In view of this situation it is not uncharitable to view with suspicion any defense, short of a denial, which may be interposed.

The principal issue raised by the pleadings is anticipation. It is claimed with respect to Koke that J. C. Mayfield, the alleged predecessor of the Koke Companies, adopted this word as early as 1888 and continuously used it to the present time. This testimony is manufactured.

Mayfield's evidence is designated by the Patent Office as "untrustworthy," and it is stated that he "apparently attached no importance to the fact that he was testifying under oath." Judge Sawtelle and Judge Foster, in finding that there was no use of the word Koke till 1909, by clear inference held Mayfield a perjurer and the defense predicated upon his alleged prior use fabricated. Mayfield is the pretended predecessor of the Koke Companies, an officer of most, and the directing spirit of all of them.

The good faith of any defense offered by the Koke Companies is therefore questionable, to be scrutinized with suspicion and accepted only if established beyond any reasonable doubt.

The defense of right to the use of the names Koke and Dope necessarily results from the claim of the Koke Companies made in their conduct and representations prior to this suit and in their answers, where it is contended that the words Koke and Dope are the trade-marks of the Koke Companies, which they alone are entitled to use.

This assertion was later coupled with the self-destructive position that the words Koke and Dope are generic terms and mean any beverage similar to Coca-Cola and may be used by anybody.

These defenses involve the presentation to the court of two mutually destructive contentions. It is first contended that Koke and Dope mean the Koke Companies' product only and hence are distinctive, and then that these words are generic and describe soft drinks generally.

That the first assertion, a property right in the Koke Companies of the words Koke and Dope, based on prior use and succession is the basis of their business as it

was of their defense is clear. They purchased three Patent Office registrations of alleged trade-marks comprising these words. The Koke Company of America sought to register the word Koke, claiming a use since 1888. The opposition in the Patent Office by the Coca-Cola Company against this application is one of the proceedings in the group of cases in which the record now before this court was used. It is the position assumed in the answer and was the basis of all the Koke Companies' contentions until the fact that it was invented for the purposes of this litigation was demonstrated. Since the showing up of this little excursion into the realm of fiction, this defense has been somewhat in the background and other defenses not so manifestly manufactured, but equally disingenuous have been urged. However, the defense of exclusive right in the Koke Companies in the words Koke and Dope is the defense which the pleadings put in issue and it must be discussed.

(1) **The contention that Koke and Dope are the trade-marks of the Koke Companies.**

The claim to trade-mark rights in the words Koke and Dope is a double one. With respect to the word Koke it is based upon

(a) Alleged priority of adoption and use by J. C. Mayfield.

(b) Title derived by alleged assignments from

(1) Murfreesboro Bottling Works and

(2) W. L. Bitting of Sherman, Texas.

With respect to the word Dope the claim to trade-mark rights in it is wholly derivative and is based upon an alleged assignment from Houppert and Worcester of Birmingham, Alabama.

(a) **The claim of trade-mark right in Koke by adoption and use.**

This is dependent wholly upon J. C. Mayfield, who claims to have originated this word, and is the source of the Koke Companies' title to it. He swears that he, with other men, was associated with Dr. J. S. Pemberton, the predecessor of The Coca-Cola Company, that Dr. Pemberton disclosed to him the Coca-Cola formula and that he (Mayfield) sold the product under the name Koke from 1888 to the present time.

With respect to the formula, Mayfield testified positively that Dr. Pemberton, in January, 1888, made known the formula for Coca-Cola to him, that Pemberton got his formula book and called it over to him word for word. (Rec., 1608.)

Mayfield is most emphatic. He testified (Rec., 1645, 1646):

“Q. 435. That was the Coca-Cola formula?

A. It was.

Q. 436. You are sure of that?

A. I am.

Q. 437. Absolutely?

A. Absolutely.

Q. 438. No possible mistake about that?

A. No, sir.

Q. 439. Now, you stated that he had made it known to you from a book, did you see this book?

A. I did.

Q. 440. Did you read from it?

A. I did.

Q. 441. What was at the top of the page, if anything?

A. Just Coca-Cola formula.

Q. 442. Just ‘Coca-Cola formula’ was at the top of the page, and he read it off to you?

A. He read it off to me and I copied it.

Q. 443. You made a copy?

A. I made a copy.

Q. 444. In Dr. Pemberton's presence?

A. Yes, sir.

Q. 445. And with his consent?

A. Sure.

Q. 446. There is no possible doubt about that?

A. No, sir."

* * * * *

(Rec., 1646) :

"Q. 462. And you regarded it, and Dr. Pemberton regarded that formula, that Coca-Cola formula as a secret formula?

A. Yes, sir."

At the risk of repetition, it is perhaps well at this point to contrast what Mayfield swears in this case as shown by the foregoing extract, with his testimony in *State v. Rice*. (Rebuttal Exhibit 6.) Here he swore :

"Q. You claim to have got the formula from the Coca-Cola people for the wine coca?

A. No, sir.

Q. Didn't you claim they got it from you?

A. No, sir.

Q. Got it from Pemberton?

A. Yes, sir.

Q. You claim that the Coca-Cola people got Pemberton's formula and you were entitled to it?

A. No, sir, they bought it from Pemberton.

Q. You have been claiming all the time that you had the Coca-Cola formula?

A. Not the Coca-Cola formula."

In this connection too the "Dear Judge letter," written on Jan. 18, 1899, is significant. Mayfield there says: "I got that from the negro that worked for the Coca-Cola Company," and again, "Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta."

The testimony of the witness Mayfield is the keystone of the arch which supports the Koke Companies' whole case. If Mayfield is successfully impeached and his story demonstrated to be false, the whole structure falls. That Mayfield's testimony is not to be relied upon is found

by the Patent Office officials, by Judge Sawtelle and by Judge Foster.

There were produced in corroboration of Mayfield's story his three sons and certain other witnesses, who testified vaguely, from memory only and without the production of anything of a tangible nature, that Koke was used by Mayfield or his companies in which he was interested between 1889 and 1908, at Atlanta, Birmingham, Nashville and St. Louis.

There were produced no books, orders, papers or labels, in fact nothing in documentary form showing any use of the name Koke before 1909. All the testimony is vague and general and when the witnesses were asked to be specific, constant refuge was found in "I don't remember."

Accepting all the statements contained in the testimony of all the witnesses in support of the asserted claim to a trade-mark right in Koke based upon Mayfield's adoption and use, to be true, with only the infirmities inevitably attaching to narratives of facts occurring many years ago and unaided by documentary evidence, and assuming that Mayfield did, as he swears, adopt the word Koke as a trade-mark in conjunction with Dr. Pemberton, Bloodworth and Murphey in 1888 and has used it continuously since, the testimony of A. O. Murphey (called as a witness on behalf of the Koke Companies, Rec., 1277), his associate at that time, demonstrates clearly that the original adoption of the name Koke was a fraud, designed to steal the Coca-Cola business, which Pemberton had previously sold and which of course they knew he had sold. Murphey testified that there was a quarrel at the time when Dr. Pemberton told him and his associates that he had previously sold the Coca-Cola business but (Rec., 1283) Murphey testified that Pemberton

agreed that "He would get us up a substitute which would be identically the same thing under a different name." * * * "We had a discussion about trying to keep the name Coca-Cola." * * * (p. 1284.) "We tacitly and silently went to work to see if we could offset it in some other way." * * * "We * * * agreed on Koke." * * * (p. 1289.) "I cannot say whether the general public at that time had adopted any nicknames for Coca-Cola. I say it is very natural. Perhaps one might be used interchangeably with the other—might be nicknamed for the other. * * *"

"We adopted the name Koke because it was the best way out of the emergency that we could see. We racked our brains to get up something with which we could meet the emergency, and that was the solution. Our idea in meeting the emergency was to still retain the thing that we had bought in some other way if we possibly could, to meet the emergency that was sprung upon us by Dr. Pemberton. He was violating his contract in regard to this particular preparation, and in adopting the name 'Koke' our idea was just such things as would influence a business man in an emergency of that kind. I would not undertake to state that this thing or that thing influenced us to make a move of that kind. This may have been instigated by business interests, such interest, such influence as would control any business man in making a business move in an emergency."*

*This testimony loses some of its point and all of its spontaneity when put in narrative. The questions actually put to the witness and his answers were as follows:

"Q. Had Coca-Cola got—had the general public at that time adopted any nicknames for Coca-Cola?

A. Why, I cannot say, Mr. Littleton.

Q. Well, was there—at that time, or before you adopted the name 'Koke' for this product, was this Coca-Cola product known by the name of 'Coca-Cola' or was it popularly and universally known by and recognized by a nickname 'Koke' before you adopted the name 'Koke' for this product?

A. I could not say as to that. I do not remember. Those little details in regard to it, I cannot remember. It is too far back. I would

Assuming that every bit of the foregoing testimony is the literal truth—that Mayfield and his associates started the use of the name Koke as a trade-mark for a beverage made under the Coca-Cola formula in January, 1888, and have used it continuously from that time to this, it is evident that it was a scheme conceived in fraud, that the name Koke was at the date of its adoption an infringement of the Coca-Cola trade-mark, that it was adopted because it was a nickname for Coca-Cola and for the purpose only of stealing the Coca-Cola business which Pemberton had already sold to the predecessors of the Coca-Cola Company. Murphey's testimony discloses the reason for its adoption and brands as fraudulent its use from the beginning. Its subsequent use has been only as an instrument of fraud and deception and to pirate upon the business and good will of the Coca-Cola Company.

not undertake to make a positive statement in regard to a thing of that kind. It may or may not have been. It naturally should be.

Q. Well, naturally should be what?

A. Well, it naturally should be, but I would not like to make a positive statement as to that.

Q. What do you mean by that—it is very natural?

A. I say it is very natural, perhaps one might be used interchangeably with the other—might be nicknamed for the other. If I had been on the road, a salesman, perhaps I might have run against a thing of that kind.

* * * * *

Q. Did you adopt the name 'Koke'—did you gentlemen adopt the name 'Koke' for the fraudulent purpose of making the public think the word 'Koke' was the same word as 'Coca-Cola'?

A. We adopted it because it was the best way out of the emergency that we could see. We racked our brains to get up something with which we could meet the emergency, and that was the solution.

Q. What was your idea in meeting the emergency, what did you have in view?

A. To still retain the thing that we had bought in some other way if we possibly could, to meet the emergency that was sprung upon us by Dr. Pemberton. He was violating his contract in regard to this particular preparation.

Q. Now, in adopting the name 'Koke' did you adopt that and try to get a name as much like that of 'Coca-Cola' as you could, or a different name from it, or what idea did you have in selecting this name 'Koke'?

A. Well, I could not say in regard to this sort of thing, just such things as would influence a business man in an emergency of that kind. I would not undertake to state that this thing or that thing influenced us to make a move of that kind. This may have been instigated by business interests, such interest, such influence as would control any business man in making a business move in the emergency."

In a case where adverse rights were sought to be based upon a use fraudulent in its inception, the Circuit Court of Appeals for the Seventh Circuit in *Raymond v. Royal Baking Powder Co.*, 85 Fed., 231, 235 (Jenkins, J.), in characterizing the defendant's mark, said:

“It was adapted and intended to deceive the public. Under such circumstances no right arises which the law will countenance. Courts do not lend their aid to protect imposition and falsehood.”

The foregoing is on the assumption that Mayfield and his co-swearers were telling the truth when they swore that the word Koke had been used by him and his alleged successors since 1888. It is perfectly plain, however, that this whole narrative is fabricated. Judge Sawtelle found:

“I find as a matter of fact from the evidence * * * that the defendants, Koke Company of America, and its predecessors, did not adopt or make use of the name ‘Koke’ until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff.”

Judge Foster has made the same finding.

The Patent Office held Mayfield's testimony untrustworthy and the majority of his witnesses incredible and that while there might have been some use of the word before 1909, no right adverse to The Coca-Cola Company can be predicated upon it.

In order to see the entire defense in this case in its proper perspective and to appreciate the character of Mayfield and the nature of the trade practices of his companies, associates, licensees and coadjutors, it is desirable to trace somewhat in detail the history of this peculiar individual.

The History of J. C. Mayfield.

J. C. Mayfield has been found by three competent tribunals on the same testimony here before the court to be unworthy of credence. There are, however, in the record facts which do not admit of doubt and there are certain statements made by Mayfield which can perhaps be accepted as true.

Mayfield came to Atlanta, Georgia, and with Murphey, Bloodworth and Pemberton organized a corporation under the name of the Pemberton Medicine Company. This is established by a court record, which is in evidence. The Pemberton Medicine Company, as its name indicates, was a patent medicine concern. Among its products was "Pemberton's French Wine of Coca," "Orange Flower Cough Syrup," "Indian Queen Hair Dye," "Lemon and Orange Elixir," and "Gingerine."

Mayfield devoted a considerable portion of his time to real estate. In 1893 he put upon the market a drink which was called Celery-Cola, the formula of which had been worked out by Pemberton. Later Mayfield left Atlanta and went to Birmingham, where he bought an interest in the Schoolar Vinegar Company and continued to make and sell Celery-Cola in connection with dealings in vinegar, "Hop Jack" or prohibition beer and wines which masqueraded as cider and sherbert for sale in dry territory. He organized a corporation at Birmingham called the Celery-Cola Company. He was also interested there in a company called the J. C. Mayfield Manufacturing Company. There was an interval when Mayfield was in Boston in 1898 and his wife, and her then husband Brown, and S. T. Mayfield (a son) were manufacturing Celery-Cola in Jersey City. There also was a time when Mayfield was making Celery-Cola in Nashville, Tennessee, when he was devoting most of his attention to an oil

scheme. During the fair in St. Louis there was a plant established there and Celery-Cola was made in St. Louis.

Celery-Cola,—possibly drinks called Wine Coca, Pepsinola, Pepoade, Vigo and soda pop were all the soft drinks which Mayfield or any of the companies in which he was interested had made up to 1909. Celery-Cola was the principal product, the others seem to have been ephemeral. In his correspondence with Pogue in 1905 and 1906, particularly Rebuttal Exhibit 12, the phrase occurs, "Celery-Cola is my all."

The Government prosecuted Mayfield and his associates concerning Celery-Cola (*U. S. v. Mayfield*, 177 Fed., 765) and upon conviction of violation of the Food and Drugs Act the affairs of the Celery-Cola Company were wound up; the formula of Celery-Cola was changed, the revised product was rechristened Koke, and Mayfield went to Shreveport, Louisiana, where he organized the Koke Company, Ltd., of Shreveport, in the fall of 1910.

It was in 1909 that Mayfield first began the use of the name Koke. His statements made in his testimony in *State v. Rice*, in evidence here, that in 1907 he was making only Celery-Cola and Pepsinola, and his sworn declarations made to the various Secretaries of State in 1910, when he was attempting to secure registration of the word Koke in the states, that its first use was in June, 1909, may be accepted as true. These statements were made before there was any litigation over Koke and before there was any incentive to falsify, and when the highly imaginative tale which he now tells was not thought of.

After leaving Shreveport Mayfield went to Little Rock, Arkansas, then to Fort Worth, Texas, and in 1911 organized the Koke Company of America and other Koke companies, which took over his pretended rights.

On November 28, 1911, J. C. Mayfield, on behalf of the Koke Company of America, purchased from Christy & Huggins, doing business as the Murfreesboro Bottling Works, registration No. 55878, in the Patent Office, consisting of the word Koke in script. This was later put in interference with an application of W. L. Bitting of Sherman, Texas, to register the word Koke in block type and Mayfield, on behalf of the Koke Company of America, bought Bitting's application which matured into registration Number 94869, paying a substantial sum in each instance. No business or good will was taken over in either case.

It is probable that at this time Mayfield had not thought of swearing back his use of Koke to 1888 because if he had, it is unlikely that he would have bought these registrations. His true purpose in buying them is characterized by Judge Sawtelle:

"I further find that the purchase of the trademark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible."

That it was sometime after the pretended purchase of the Murfreesboro mark (November, 1911) that the present claim of priority was evolved, is clear from the fact that the contract between the Koke Company of America and the Southern Koke Company, Ltd. (Exhibit 174) recites Mayfield's source of title, not as one by adoption and use of the word Koke from 1888, but as derived only by purchase from the Murfreesboro Bot-

ting Works and in his correspondence with Christy & Huggins concerning the Bitting interference, when the question of priority of the use of the word Koke was vital, Mayfield makes no mention of any prior use by him. (See Rebuttal Exhibits 92-100.) Indeed in Exhibit 100 Mayfield, on March 3, 1913, in writing to Christy & Huggins says (referring to Bitting's claimed date of use of 1898), "This party claimed priority to right so I understand." If Mayfield had used the word Koke since 1888, as he now asserts, it is inconceivable that in preparing for that interference he would not have mentioned it to his associates.

From the foregoing it will be seen that there is enough material in the undisputed facts upon which to rear the superstructure of fiction which Mayfield has fabricated. All that it was necessary to do was to add Koke to the list of drinks which he undeniably made and swear it back as far as possible.

That Mayfield's scheme of purloining the good will of the Coca-Cola Company was conceived before 1899, when he was manufacturing and selling only "Celery-Cola," is shown by Murphey's testimony, and the incident related by Mr. Candler (Rec., 385), from which it seems that Mayfield was substituting a drink called Yum Yum for Coca-Cola as far back as 1893.

His piratical intention is evidenced by the certificate alleged to have been given to Mayfield by Mrs. Pemberton. This document, dated August 1, 1899, contains the following statement:

"To my personal knowledge Mr. Mayfield was an expert in the manufacture of both the above commodities long before the present Coca-Cola and Wine Coca Companies were formed, and he has been at the head of the manufacturing department of one or the other of these companies ever since their organization."

This certificate contains a statement which Mayfield has never had the hardihood to contend is the truth. In fact, Mayfield admits its falsity. (Rec., 2426.)

He never had any connection directly or indirectly with the Coca-Cola Company and was never at the head of the manufacturing department or had anything to do with it. He does not assert that he ever was.

The "dear Judge letter" is further evidence that he did not know the formula and was trying in every way to find out how to make Coca-Cola. This precious document (the writing of which Mayfield admits) is printed in full later.

It is further shown in one of the Pogue letters, admittedly written by Mayfield in 1905 (Rebuttal Exhibit No. 28), that Celery Cola was habitually and to Mayfield's knowledge substituted for Coca-Cola. He says:

"The druggists there would buy anything just as quick as they would 'Celery-Cola,' for they substitute for Coca-Cola anyway largely."

The Coca-Cola Company contends and Judge Sawtelle and Judge Foster both found that there never was any use whatever of the word Koke by Mayfield until June 1, 1909. There can be no doubt of the correctness of this conclusion. We have Mayfield's positive statement in *State v. Rice* that he was not using it in 1907. On Dec. 15, 1905, he wrote to Pogue "Celery-Cola is my all." (Exhibit 12.) We have his statements six times repeated in his affidavits for state registration that the first use was June 1, 1909. (Rebuttal Exhibits 84, 85, 86, 87, 88, 89.) We have the fact of his purchase of the Murfreesboro and Bitting marks for substantial considerations, which is wholly inconsistent with the idea of superior title or prior right in Mayfield. We have the source of the title of Mayfield in the contract between the Koke Company of

America and the Southern Koke Company, Ltd., alleged to be based on this purchase and not on any prior use.

Against these facts is the inherently incredible story of Mayfield and his co-swearers, discredited and disbelieved by three courts, unsupported by anything of a tangible character, coupled with Mayfield's proved perjury, and his successful impeachment as a witness.

The Koke Companies have wholly failed to sustain the burden placed upon them of justifying their fraud, and in this connection it may be suggested that those who are guilty of the conduct of which they admit themselves to be guilty are not likely to hesitate at fabricating a defense to escape the penalties of their wrongdoing.

Comments on the Testimony of J. C. Mayfield.

It is plain from a perusal of Mayfield's testimony in this case and a comparison of it with the testimony that he gave in *State v. Rice* in 1907 (Rebuttal Exhibits 4 and 5), and in view of the repeated declarations he made under oath in connection with the registration of the name Koke in the various states (Rebuttal Exhibits 84-89), that Mayfield's story that he used the name Koke before 1909 is pure invention.

The following are parallels of a few of Mayfield's most glaring contradictions which we believe demonstrate him to be a deliberate falsifier.

Judges Sawtelle and Foster inferentially, and the Examiner of Interferences expressly, found him unworthy of belief.

J. C. Mayfield, testifying in this case in New Orleans on March 10, 1915, said (Rec., 1683) :

"Q. 1328. Do you know of a Mr. Rice of Memphis, Tennessee?

A. I have heard of him.

Q. 1329. Do you know him?

A. Yes, sir.

Q. 1330. Did he work for you?

A. Yes, for a while.

Q. 1331. Was not there some claim that he took your formula away with him?

A. Yes, sir.

Q. 1332. Was he prosecuted for that?

A. Yes, sir.

Q. 1333. He started that with your formula?

A. I do not know.

Q. 1334. But he was prosecuted?

A. I do not know, only about the case.

Q. 1335. *You were not there at the hearing?*

A. *No, sir.*

Mayfield's attention was called to this statement, and he was confronted with a transcript of his testimony in *State v. Rice*, at Chattanooga on July 5, 1915, and he was asked (Rec., 2409) :

You testified to that effect at New Orleans, did you not?

A. *If I said, no, sir, it was a mistake. I said, yes, sir.*

Q. 5. This is your testimony, taken at New Orleans, reported by the Commissioner on behalf of the defendants?

A. I don't know about the typographical work there; I was there, of course.

Q. 6. *You say that is a typographical error?*

A. *A typographical error.*

Q. 7. *And that you did not say, "No, sir"; you said yes, sir?*

A. *I said, yes, sir.*

Q. 8. And that Mr. Fain, the Commissioner, appointed on behalf of the defendants, made a mistake; is that it?

A. They must have made it; it is a mistake.

Q. 9. You were there?

A. I was there; yes, sir.

Q. 10. Did you testify in that Rice case?

A. I did.

Q. 11. You were sworn in that case, were you not?

A. I suppose so.

The record itself demonstrates that the "typographical error" is an impudent fabrication. If the witness had stated that he was present at the hearing, of course, the next question would have been "did you not testify in that case." The subject certainly would not have been dropped.

It is not surprising that Mayfield hoped to conceal his connection with *State v. Rice*. He was present at the

trial and testified. His testimony there (a transcript of which is in evidence as Rebuttal Exhibits 4 and 5) is utterly at variance with his claims here. After this transcript was offered and in response to repeated requests of counsel for The Coca-Cola Company, Mayfield was put back on the stand and attempted to explain the discrepancies between his two sworn statements. He admitted the correctness of the transcript of his testimony in *State v. Rice* and then naively stated that he "evaded in a way," as he calls it, the questions put to him in the course of that trial and attempted to explain how he came to do it. Instead of helping matters he succeeded, by his attempted explanations, in making the contradictions only the more apparent, for his "explanations" contradict not only his own previous testimony, but that of his son, S. T. Mayfield, and of many of the witnesses who had sworn in his behalf. For example:

Mayfield testified here, in March, 1915, that he got the Coca-Cola formula from Dr. Pemberton in 1888.

In 1899 he wrote the "Dear Judge" letter, in which he states that he got what he knew of it from a negro that worked for The Coca-Cola Company and certain things from Brooks, the old Coca-Cola drummer.

He testified in *State v. Rice*, in 1907, that he did not have the Coca-Cola formula and did not claim it, but that The Coca-Cola Company bought it from Pemberton.

He then attempts, in July, 1915, to explain his testimony in *State v. Rice*, by swearing that his wife was in the court room while he was testifying, that she had been trying to get the Coca-Cola formula from him and that he "evaded" when he said that he did not have it, forgetting apparently that he had testified in March, 1915, in this case, that his wife knew the Koke formula, which he claims is the same as

the Coca-Cola formula, and that his son, S. T. Mayfield, had testified that his mother, the same woman from whom Mayfield says he was trying in 1907 to conceal the Koke formula, was making Koke in 1895 or 1896 with a man named John McCowan.

This series of contradictions is so ludicrous and seems so incredible that the actual testimony is here paralleled so that the court can see for itself what a mess this man has got himself into. The italics are ours.

COLUMN 1.

Mayfield's testimony in this case at New Orleans, March 10, 1915 (Rec., 1608):

Q. 49. Now, was the formula for making Coca-Cola made known by Dr. Pemberton to the members of that partnership at that time?

A. It was to me.

Q. 50. Now, explain, did he just tell you what the formula was, or how was that, how did he make it known to you?

A. He got his formula book and called it over to me word for word before we left the Marietta Street place, before the contract—oh, well, anyhow, it might have been after, but he was in bed sick and we thought we ought to have it, you know; we were looking after things and we had paid in our money and I think he sent for me and I went up to his sick bed and he had the formula book and I brought me a book and I copied everything word for word as he give it out, with complete instructions.

Q. 51. What—*was the formula for Coca-Cola copied by you at that time?*

A. *It was.*

Q. 52. What became of that book, Mr. Mayfield?

A. I do not know what ever did become of it, that book. It may have been I was—I reckon it was a little book, anyhow, I had copies of it, complete copies either on a book or paper.

* * * *

COLUMN 2.

Extracts from Mayfield testimony in *State v. Rice*, at Birmingham, Ala., in 1907. (Rebuttal Ex. 4, 5, pp. 51, 52.)

Parker House, Boston,

June 18, 1899.

My Dear Judge:

I have just completed my experimenting with coca extract. I have perfected everything. Now, listen, our original formula called for just twice the amount of coca extract that we are now using. I kept cutting it down to make the flavor more pleasant. It did not call for glycerine. I put that in to eliminate the bitter from the coca extract. *I got that from the negro that worked for Coca-Cola Company.* The Coca-Cola Company extracted the leaves so they could hold up the quantity of extract, I now have. I read an article from a German chemist and *Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta.* You do know that it is the coca extract and caffeine that does the work. All the trade who have been cutting the goods, that is, mixing simple syrup with it, say wine coca would not stand as much. It will now. So I will show you just how to use the glycerine with the leaves while I am with you Sunday and Monday. I want you to use two and a half gallons of the extract you are now making instead of 1 1-4. Measure out the 2 1-2 gallons extract, put it in a 5-gallon keg and put 2 gal-

COLUMN 3.

Mayfield's attempted explanation at Chattanooga, July 15, 1915 (Rec., 2419) :

I was in hopes we would get through with this lawsuit without dragging through the graveyard, disturbing the dead, and I so far have evaded it, but since you brought up that letter I have to explain. This Dear Judge was the husband of my first wife. I will state, however, that she secured a divorce from me in Atlanta, legally. The court gave me the children, and I did the best I could to raise them and educate them and bring them up. My wife was demented. All our family physicians told me so, but at times she had rational intervals, and at those times she was very grasping, making money, and the fact that I bought out the Coca-Cola business while she was my wife she thought she was entitled to a copy of the Coca-Cola formula, notwithstanding the fact that she made with her attorney a final settlement that was satisfactory. *This letter was written several years after our divorce. She demanded of me a copy of that formula.* I put her off with one excuse after another. At this time my son and I had a little business in Jersey City. She went to his place of business—I had no objection—because my son was her son. I was over there once or twice, and *she realized the value of the Coca-Cola formula—or the Koke formula, which was the same,* and that if she could get a certificate from me she would be able to make considerable money by selling this formula. I put her off with one excuse after another, that I had misplaced the formula—lost it, here, yonder or some place else—and that I

COLUMN 4.

Mayfield testified in New Orleans in this case on March 10, 1915 (Rec., 1679) :

"Q. 1298. I want to ask you if your first wife became Mrs. Diva Brown afterwards?

A. Yes, sir.

Q. 1299. And Mrs. Diva Brown was around the plant in Atlanta, Georgia, she was Mrs. Mayfield at that time, and was around the plant in Atlanta, Georgia, was she not when you first started to manufacture?

A. No, sir, she was not there in 1888.

Q. 1300. When did she start coming around the plant as I understand?

A. Well, she started when I went back there in 1903.

Q. 1301. 1903?

A. I mean 1893.

Q. 1302. Well, did you go away from Atlanta before 1893?

A. I sent my wife away from there, and children, back to Roanoke, Alabama. My family were only there for a little while, the children in school. It was a cheaper place to live and after she got well they came back.

Q. 1303. In 1893?

A. She was not around the place, nobody ever seen her around there during the first business there, 1888 or 1889.

Q. 1304. Did she help manufacture around the plant at all?

A. *She may have helped a little around with my son and Mr. Bloodworth when we went back there. I think she did, in '93 up to '94 or '95, along there.*

Q. 1305. Was she familiar with this formula that you got from Doctor Pemberton?

A. Well, I could not answer that,

COLUMN 1.

(Rec., 1645) :

"Q. 433. You stated, Mr. Mayfield, on your direct examination that *Doctor J. S. Pemberton made known the formula for Koke or Coca-Cola to me*, he got his formula book and called it over to me word for word; when was that?

A. That was *in January*, just after he had signed the contract.

Q. 434. Of what year?

A. Of 1888.

Q. 435. *That was the Coca-Cola formula?*

A. It was.

Q. 436. *You are sure of that?*

A. *I am.*

Q. 437. *Absolutely?*

A. *Absolutely.*

Q. 438. *No possible mistake about that?*

A. *No, sir.*

Q. 439. Now, you stated that he made it known to you from a book, did you see this book?

A. I did.

Q. 440. Did you read from it?

A. I did.

Q. 441. What was at the top of the page, if anything?

A. Just Coca-Cola formula.

Q. 442. *Just "Coca-Cola formula" was at the top of the page, and he read it off to you?*

A. *He read it off to me and I copied it.*

Q. 443. *You made a copy?*

A. *I made a copy.*

Q. 444. In Doctor Pemberton's presence?

A. Yes, sir.

Q. 445. And with his consent?

A. Sure.

Q. 446. *There is no possible doubt about that?*

A. *No, sir."*

* * * *

(Rec., 1646) :

"Q. 462. And you regarded it, and

COLUMN 2.

lons glycerine with it in same keg, shake it three or four times a day. You can use it in six hours after thus treating it. If the glycerine eliminates the bitter, which it does, you can see how much more effective it can do the work in close contact. It's still better to use a certain per cent. with the leaves in mixing them that I will show you. Now change your formula to 2 1-2 gallons instead of 1 1-4; use 2 gallons of glycerine instead of 5, it will not change the cost of the compound nor the flavor one bit, and gives it a more exhilarating drink. Every man in the office here this morning was carried away with the improvement. I will make some flavoring for you Monday so you can see. Have alcohol, leaves, glycerine, Lime C. P. I will go and buy the oils Monday morning. *We have now the original formula and Coca-Cola exactly;* buy 12 lbs. confectionaries and sugar, extra quality, dissolve it with 1 gallon boiling water so I can make some tests Monday. *I will have some 'Coca-Cola' and 'Wine Coca' with me, I am 'tickled to death' at being able to get back to the original formula and make it identical 'Coca-Cola.'* Have everything ready and we will start operations Saturday morning.

Your friend,

JACK."

The foregoing is a letter Mayfield admitted writing and is a part of the record in *State v. Rice*. He testified further (pp. 63, 64) :

Q. *You claim to have got the formula from the Coca-Cola people for the wine coca?*

A. *No, sir.*

Q. *Didn't you claim they got it from you?*

COLUMN 3.

would get it. I wrote her and wrote Brown several letters along that line, but so very anxious was she to get it she came to Boston. I do not know, but I believe, when I wrote this letter in question that she was there. I gave it to her. She came there for it. As I said before, she was demented. *I wrote that letter, and I wanted to make it ring with a genuine ring*, so that she and Judge Brown, who was her lawyer—her husband, he was a lawyer of course, he was a judge,—and she went back satisfied with that letter. I had put her off, as before stated, with other excuses. I promised in that letter to be in Jersey City, or New York, on Monday. I was not there, and did not go. If I had gone, and given her a copy of my formula, and taught her and Brown how to make Koke,—Coca-Cola,—this letter and Mrs. Brown would never have appeared in the Rice case; but I did not go, because it was practically my all. I came on back home. I realized what I was up against—a woman who was demented and determined to have a copy of this formula—and being the mother of my children, naturally I thought and planned every way possible to get around giving her what she wanted without wounding her feelings. About the same time I received a letter from my father, that one of my children was sick, so I left Boston. I did not go to New York, or to Jersey City, nor did I comply with my instructions in that letter. I came on to Atlanta, and then to Birmingham, because I did not do what I promised to do, *she appeared in this Rice case, for no other reason in the world except to*

COLUMN 4.

she had opportunities helping around there to get familiar with it, and what a wife would have with a husband's business."

S. T. Mayfield swears (Rec., 1458):

"My mother and John McCowan made Koke."

This was in 1895 or 1896 (Rec., 1458.)

COLUMN 1.

Doctor Pemberton regarded that formula, that Coca-Cola formula as a secret formula?

A. Yes, sir."

COLUMN 2.

A. *No, sir.*

Q. *Got it from Pemberton?*

A. *Yes, sir.*

Q. *You claim that the Coca-Cola people got Pemberton's formula and you were entitled to it?*

A. *No, sir; they bought it from Pemberton.*

Q. *You had been claiming all the time that you had the Coca-Cola formula?*

A. *Not the Coca-Cola formula.*

Q. Have you not been advertising that you had the formula for the drink the Coca-Cola people claimed?*

A. I may have said I manufactured the stuff—

Q. Didn't you say that you as a chemist of the J. C. Mayfield Company had years of experience in making Coca-Cola?

A. I manufactured it before they bought it from Pemberton.

Q. And you claim that the present Coca-Cola people bought it from Pemberton after you made it?

(63) A. I made the impression that I was an experienced manufacturer.

Q. And knew how to make it?

A. I was experienced in the making of soda fountain beverages.

Q. *Don't you advertise that you know how to make and do make Coca-Cola?*

A. *I don't make it.* I advertise the letter that Dr. Pemberton's wife gave me that I was once associated with her husband in the manufacture of Coca-Cola.

*The Mrs. Pemberton certificate is no doubt what is referred to. (See Rebuttal Exhibit 10.)

COLUMN 3.

get all she could from me relative to this formula. She had no interest in the case, and she was there, and it was her questions largely that I answered. Of course, she propounded them through the attorney. The attorney did not know anything about all those oils and all those things—she, in a measure, did—that is what she was after. She had possibly a superficial knowledge of the formula, but she wanted facts, the proportional parts, and by being there she hoped to get them. I evaded in a way a great many of her questions—those which did not apply to the case at issue. I had the city physician, of Birmingham, Ala., to be present at this trial and he was there. I told him what I had to contend with, and he said he would be present, and he noticed her condition. As before stated, the case at issue had no bearing on a great many of these questions, and as she had demanded a copy of the Coca-Cola formula, or the Koke formula, and I had told her and Judge Brown that I had lost it, or misplaced it, she was there to get all the information she could. Of course, I had not lost it, and I had not misplaced it, because I was making Koke in Jersey City at that time from the original Coca-Cola formula—I do not mean I was making Koke in Jersey City, at the time of the Rice trial, I am talking about in Jersey City, when I wrote this letter, and she was in Boston, demanding of me a copy of that formula, and a certificate from me that it was the original Coca-Cola formula. I would not give it but evaded her and put her off with the excuse

COLUMN 4.

COLUMN 1.

COLUMN 2.

Q. And knew how to make it before the present Coca-Cola people got the formula?

A. I think she stated that to me.

.

COLUMN 3.

that I had lost it in order to get rid of what I—which was true—a woman that was not at herself. I was trying to protect my property and my life. She had threatened my life and in fact had attempted it two or three times.

* * * *

(p. 2436) :

A. Well, I hate to explain it, but I will. *Mrs. Brown, the mother of my children, was propounding these questions through the attorney on the other side.* I had told her often and often that I had lost the Coca-Cola formula, which is the Koke formula, you might say. She was after all the information she could get about the Koke formula, or the Coca-Cola formula. *I had evaded giving it to her in every way possible.* She stated in some of her advertisements and things that she had the original Coca-Cola formula. This letter addressed to Judge Brown, was written eleven years after Dr. Pemberton's death. If I had given her the copy of the formula, if I had gone to Jersey City and taught her how to make it, she would not have appeared in this case, but not having it, not being able to sell the formula as she wanted to, she appeared in this case and sought all the information possible, and *that is why those questions were asked.* *I evaded them along that line because they were immaterial and did not have any bearing on the case at issue.* *As before stated, my property was at stake, and that is why I answered those questions along there as I did.* At the time of this trial, April 19, 1907, she had not a satisfactory formula. She did, however, after that,

COLUMN 4.

COLUMN 1.

COLUMN 2.

COLUMN 3.

in some manner, get a satisfactory formula, or rather a formula—I do not know that it is a satisfactory formula—but a formula that made a good cola beverage.—I know she got a lot of it in this particular trial, and as Rice had stolen my Celery Cola formula I have reasons to believe that Rice gave her a copy of the celery cola formula.

COLUMN 4.

If, when Mayfield was testifying in *State v. Rice*, his wife knew the formula, as S. T. Mayfield swears she did, Mayfield's excuse for testifying falsely—that he was trying to conceal it from her—is a complete failure. If it be objected that S. T. Mayfield is mistaken and cannot know what his mother knew, it is a simple matter to arrive at the same result by another route.

Concerning the transaction which resulted in the alleged purchase of the Dope trade-mark from Houppert and Worcester of Birmingham, S. T. Mayfield testified that Houppert and Worcester disclosed a formula to him, that this was the formula under which Houppert and Worcester had been making the drink which they sold as Dope, and that this was the same as the Koke formula.

He swears (Rec., 1464):

“Q. 105. Was the formula for making that Dope made known to you at the time of making this purchase?”

A. Yes, sir.

Q. 106. How did that formula compare with the formula for making Koke?

A. Well, practically the same thing; it was the same; there might have been some little minor detail as to some ingredient, but I did not notice it if it was. Of course, I knew the formula for making Koke, and have it in my head and I have had for a long, long time.”

The answer to the amended bill in this case contains the following (Rec., 195):

“In about the year 1903, P. L. Houppert and Samuel H. Worcester, of Birmingham, Alabama, partners, doing business under the firm name and style of ‘Houppert & Worcester,’ having acquired a knowledge of the formula from which respondents’ predecessors in title had theretofore manufactured their extract, syrup and beverage known as ‘Koke,’ began to manufacture, market and sell, in interstate commerce, an extract, syrup, and beverage, which were substantially identical with the extract, syrup and beverage theretofore manufactured and sold under the name of ‘Koke,’ by respondents’ predecessors in title, and substantially identical with that which the respondents are now manufacturing and selling under the name of ‘Dope.’ ”

The witness, Campbell, who was connected with Houppert and Worcester, testified that the Dope formula was obtained by them in 1907 from Mrs. J. C. Mayfield. (Rec., 1373.)

Therefore, since the Koke and Dope formulas are the same and Mrs. J. C. Mayfield in 1907 knew and sold the Dope formula, she must then have known the Koke formula. But Mayfield swears that in 1907 in *State v. Rice* he testified as he did to conceal it from her.

First Use of Koke.

J. C. Mayfield testified in this case at New Orleans on March 10, 1915, that he and the Koke Company of America, as his assignee, have continuously used the word Koke as a trade-mark since 1888, and that it was sold in receptacles labelled or stencilled with the name “Koke” during all that time. (Rec., 1616, 1617.)

In his applications made in September of the year 1910 to register Koke as a trade-mark in various states

the date of the first use of Koke is sworn by Mayfield to have been June 1, 1909.

In his application to register Koke in the State of New York (Rebuttal Exhibit 84) he swore:

“The same has been in use by applicant since June 1, 1909.”

In his application to register “Koke” as a trade-mark in Indiana (Rebuttal Exhibit 85) he swore:

“Length of time, if any, during which the trade-mark ‘Koke’ has been in use—since June 1, 1909.”

In his application to register Koke as a trade-mark in Massachusetts (Rebuttal Exhibit 86) he swore:

“Length of time during which the trade-mark has been in use—since June 1, 1909.”

In his application to register Koke as a trade-mark in Nebraska (Rebuttal Exhibit 87) he swore:

“The said trade-mark or label has been in use since June 1, 1909, and consists of the arbitrarily selected mark or character herewith illustrated ‘Koke’ (trade-mark).”

In his application to register Koke as a trade-mark in California (Rebuttal Exhibit 88) he swore:

“This trade-mark consists ‘Koke a beverage.’ This trade-mark has been used in its business since the first day of June, 1909.”

In his application to register Koke as a trade-mark in Pennsylvania (Rebuttal Exhibit 89) he swore:

“The trade-mark consists of the word ‘Koke,’ the length of time, if any, during which it has been in use fourteen months.” (This application is dated Sept. 16, 1910.)

These applications purported to be made by the Koke Company of Shreveport, Louisiana, but Mayfield says (Rec., 1632):

“They were my trade-marks and my business

and I just took them out in the name of the company.”

Mayfield’s explanation that he was referring to the adoption of a particular barrel label when he made these affidavits is ridiculous.

The applications clearly refer to the word Koke, not to any particular label, and the Pennsylvania affidavit (Rebuttal Exhibit 89) explicitly recites that “The trade-mark consists of the word ‘Koke.’ ”

The same statement occurs in the Massachusetts application (Rebuttal Exhibit 86).

The transfers of these state registrations from the Koke Company, Limited, of Shreveport, back to J. C. Mayfield, all describe the mark, not as a particular label, but “the trade-mark ‘Koke.’ ” (See Defendants’ Exhibit 156.)

The date of use given in these applications (June 1, 1909) was not the date of the organization of the Koke Company, Limited, of Shreveport. This corporation Mayfield swears was organized in the fall of 1910 (Rec., 1673), about the time these affidavits were made, so that the date, June 1, 1909, must refer to Mayfield’s individual use and is when he adopted and first began to use the word Koke.

Manufacture of Koke in Birmingham and Nashville.

J. C. Mayfield testified in this case in New Orleans on March 10, 1915 (Rec., 1665) :

"Q. 919. I will get to that, the J. C. Mayfield Manufacturing Company was on 20th street, this bottling—they were bottling what?

A. They bottled everything I was then introducing, all of my different flavors.

Q. 920. They bottle Koke?

A. Koke, Celery Cola, Vigo, Pepsi-Nola, and all the soda water flavors."

Again he says (Rec., 1685) :

"XQ. 1371. You state positively that during the time you were in Nashville the *J. C. Mayfield Manufacturing Company* manufactured Koke?

A. Yes, they manufactured Koke."

In *State v. Rice* at Birmingham in 1907 he said (Rebuttal Ex. 4, 5, pp. 7, 8, 25, 26) :

I am president of the J. C. Mayfield Manufacturing Company. It was organized about five years ago. It is still doing business. They are doing nothing now, except supplying the Celery-Cola Company with their goods. They have contracts with the Celery-Cola Company on their specialties, Celery Cola and Pepsinola.

* * * *

Q. *Mr. Mayfield, what does your company manufacture besides this Celery Cola?*

The state objects to the question.

The Court: Answer the question.

A. *That is all they do.*

Q. Does this Celery Cola Company manufacture anything except Celery Cola?

A. *They do other business, but don't manufacture anything else except these two drinks.*

However, at Chattanooga, on July 5, 1915, Mayfield swears (Rec., 2423), that "Celery-Cola" and "Pepsi-Nola" were the only two things the J. C. Mayfield Manufacturing Company had just at that time; that he individually had the Koke formula, and then in almost the same breath he contradicts himself by saying (Rec., 2431) that "Celery-Cola" and "Pepsi-Nola" were what the Celery-Cola Company manufactured. They had a license from the Mayfield Manufacturing Company to manufacture these two specialties. And again (Rec., 2431) he puts a third version on the situation when he says:

"I manufactured all the stuff, not only 'Celery-Cola' and 'Pepsi-Nola,' and manufactured 'Koke.'"

S. T. Mayfield, on the other hand, swears (Rec., 1460) that the company manufactured and sold Koke and Celery-Cola and Pepsi-Nola, extracts and syrups.

And again (Rec., 1478) he swears:

“XQ. 440. What did the J. C. Mayfield Manufacturing Company continue to manufacture?

A. They continued to manufacture ‘Celery-Cola,’ ‘Koke’ and ‘Pepsi-Nola,’ just as in Nashville.”

J. W. Mayfield says (Rec., 1536) that during the time the J. C. Mayfield Manufacturing Company was doing business there, they were making “Koke” and “Celery-Cola” and “Pepsi-Nola.”

And again he says (Rec., 1545) that the Celery-Cola Company was operating down there (Birmingham), manufacturing Koke.

The Rebuttal Exhibits 11 and 55, have among them letterheads of the J. C. Mayfield Manufacturing Company, and Celery-Cola Company, which announce “Manufacturers of Mayfield’s Extracts.”

In short, the truth of the matter is that the J. C. Mayfield Manufacturing Company and the Celery-Cola Company were putting out two drinks, “Celery-Cola” and “Pepsi-Nola.” For the purposes of this case Koke has been since added.

There were produced by the Coca-Cola Company in rebuttal a large number of employes of the Celery-Cola Company and J. C. Mayfield Manufacturing Company who testified that they never had heard of any product called Koke being made by either of these companies. A large number of letterheads and advertisements of the Celery-Cola Company and J. C. Mayfield Manufacturing Company were produced by the witness Pogue, an ex-employe of these companies, in response to a *subpoena duces tecum*. None of these showed the name

Koke. Then Mayfield, to get himself out of the hole that he had got himself into, swears that it was not his companies that made Koke, but that he personally made it, forgetting apparently that his two sons had previously testified that the companies had made it.

Reasons for Adopting Koke.

A. O. Murphey (Rec., 1277), testifying first, admits that when he says the word Koke was adopted, it was known as a nickname for Coca-Cola (page 1289):

“I cannot say whether the general public at that time had adapted any nicknames for Coca Cola. I say it is very natural, perhaps one might be used interchangeably with the other—might be nicknamed for the other. * * * We adopted the name Koke because it was the best way out of the emergency that we could see.”

This witness' idea of meeting the emergency was to “retain the thing that we thought we had bought,” namely, Coca-Cola, “in some other way.” In short the name was selected because it would enable them to pirate the Coca-Cola business.

Of course Mayfield had to make good on this so swore manfully when he was afterward called.

He says (Rec., 1613):

“At that time I had never heard of Koke, we adopted it on account of its being new and a coined word, that is it, that is an easy word, short. It was something new, the others had never heard of it.”

Formula.

Mayfield, in July, 1915, says (Rec., 2427):

“Q. 751. Did anybody else know the formula for Celery-Cola?

A. No, sir.

Q. 752. Did anybody else know how to mix the syrups up?”

In explanation he states that there are two formulas, one is a scientific formula, making the extracts, the flavoring. The other is a mixing, a manufacturing formula. (Rec., 2428.)

“Q. 754. Did anybody besides yourself know the mixing formula?

A. Yes, sir; my sons knew the mixing formula, but they did not know the scientific end of it.”

Bearing in mind that the scientific end is making the extracts, Mayfield forgot that he had already testified in March, 1915. (Rec., 1660):

“Q. 817. * * * your son, Mr. Steve Mayfield, remained at Nashville and did some manufacturing, manufactured these extracts, both Koke and Celery-Cola?

A. Yes, sir.”

And again he testified (Rec., 1667):

“Q. 994. You made Koke flavoring and Celery-Cola?

A. Yes, sir.

Q. 995. And you are the only one that made that up to the Van Deusen time?

A. Well, my boys made it.”

S. T. Mayfield also testified (Rec., 1464):

“Of course I knew the formula for making Koke and have it in my head, and I have had for a long, long time.”

In Rebuttal Exhibit 20, Mayfield writes to Pogue saying:

“S. T. Mayfield made Celery-Cola ten years ago. It was he who made my goods in New York while I was on the road. He manufactured C. C. while I was in the oil field.”

Advertising of Koke.

Much is said about the extensive advertising by the Koke Companies. Mayfield produces some futurist specimens, which purport to have been issued by the South-

ern Koke Company and others, though the financial statement in the prospectus of the Southern Koke Company says nothing about any advertising expense. (Exhibit 169.)

It costs money to advertise and either Mayfield is wrong in his testimony or the prospectus is wrong in its facts. Either the Koke Companies were swelling the profits of the concern with a view to selling stock to possible investors or Mayfield's testimony and the samples of advertising he produced were concocted for the purposes of this litigation. The latter is probably the truth, in view of other significant facts.

Mayfield testified (Rec., 1692) that he bought considerable Koke advertising from the Meek and Beach Company.

In rebuttal plaintiff called Ernest Higgin (Rec., 2067) and Henry Hartman (Rec., 2070), both connected with the Meek and Beach Company, who testified that they never at any time furnished any advertising to anybody with the word Koke on it, but they do remember furnishing Celery-Cola advertising.

Mayfield stated to George H. Wilkins (Rec., 866):

"I am not going to do any advertising for Koke."

Moore, the salesman of the Koke Company of Texas said to J. M. Penland, President of the Waco Drug Company, whom he was trying to induce to handle Koke, that the Koke Company was in position to give a lower price than Coca-Cola

"because they were not doing any advertising, that the average person who called for Coca-Cola used the word 'Coke,' and that they would get the benefit of the advertising done by the Coca-Cola Company." (Rec., 1979.)

This is confirmed by the conversation between G. H. McLean, advertising solicitor of the Dallas News and

J. G. Van Winkle, secretary of the Koke Company of Texas. McLean called to solicit advertising (Rec., 730):

“I met Mr. Van Winkle and at that time it was my intention to solicit him for a card for the jobbers and manufacturers’ trade and we discussed advertising for a few minutes and Mr. Van Winkle told me that the Koke Company of Texas was not doing any advertising. He said they couldn’t afford to advertise from the fact that they were selling, I believe he said, ‘Koke’—I don’t know if he mentioned the brand or not, it seems to me like it was ‘Koke,’ it may have been some other name—but that it was the same formula as ‘Coca-Cola’ and said that the ‘Coca-Cola’ people were advertising and it was generally known as ‘Koke’; that is a large percentage of people would call for ‘coke,’ and if the fountains were supplied with ‘Koke’ they could furnish him with this product and sell it or distribute it in that way. I believe that was the main reason. I didn’t have any argument to offset that, consequently I never called on him any more.”

Manufacture of Koke in St. Louis and Nashville.

Mayfield testified (Rec., 1595):

“I went to St. Louis to see if I could not organize a company there. It was a bottling company. * * * Maybe I stayed there until 1900, sometime in 1900. Then I went from there to Nashville. I was all the time making Celery-Cola and Koke.”

M. J. Handley (Rec., 1989) testified that he was president of the Tennessee Carbonating Supply Company, which had a contract with the J. C. Mayfield Manufacturing Company and bought their products, namely, Celery-Cola and Pepsi-Nola, and that he never heard of the J. C. Mayfield Manufacturing Company handling, advertising, selling or disposing of or dispensing in any way of anything under the name of Koke.

The Coca-Cola Company called in rebuttal Norville N. Leaver, who was salesman for Mayfield’s St. Louis

companies (Rec., 2035), who stated that he was connected with those companies in 1903 and 1904 as city salesman; that the only things they made were Celery-Cola and Pepo-ade and that he had never heard of Koke and never sold any, and John H. Bohne (Rec., 2041), the chemist who worked for the St. Louis concerns during 1903 and 1904 manufacturing all the products they put out. He also never heard of any Koke.

Koke in Birmingham and the Labels Used There.

One of the most curious masses of contradictions that this record, with all its richness in that respect, discloses, is the Birmingham situation. Mayfield and his sons testified that they were making Koke in Birmingham.

According to their statements the Celery-Cola Company did make Koke and did not make Koke—the J. C. Mayfield Company did make Koke and did not make Koke—that Mayfield personally made Koke—that none of them bottled Koke and that all of them bottled Koke; and that it was all labeled—upon this last they are unanimous.

In rebuttal a large number of ex-employees of Mayfield and his companies were put on the stand by The Coca-Cola Company. They were disinterested men and women of every class of employment, stenographers, bookkeepers, clerks, traveling salesmen, bottlers and draymen, and these people, without exception, testified that they never heard of any product made by Mayfield, the J. C. Mayfield Manufacturing Company or the Celery-Cola Company called or labeled or sold as Koke during this period. They all, however, remember Celery-Cola distinctly.

The names of these witnesses and the pages of the

record where their testimony may be found are: S. A. Ellis (1842), L. M. Barelift (1844), D. E. Moody (1881), B. U. Hopper (1891), W. M. Smith (1893), J. T. Ensley (1900), Thomas Dickson (1906), Homer Brewer (1911), Tom Anderson (1913), George E. Anderson (1917), Mack Crawford (1921), Walter Thomas (1922), Miss N. L. Bonham (1924), Will Barrow (1925), John L. Bevell (1930), W. J. Garrett (1984), Melville Rice (1986), and Mrs. Rufus H. Page (2073).

Charles J. Pogue was employed at Birmingham by the J. C. Mayfield Mfg. Co. in 1904 and was with that company and the Celery-Cola Company until the fall of 1906. (Rec., 1858.) This was the time during which Mayfield and his companies claim to have made Koke in large quantities, and it was the time when the witnesses at Birmingham, who were called on behalf of the Koke Companies, testified that they had purchased Koke in receptacles so marked. Pogue was Mayfield's intimate friend and confidential man. While the testimony of the Koke Companies was being taken at Birmingham, Pogue was engaged in rounding up and interviewing witnesses who would undertake to testify in their behalf in this case that the J. C. Mayfield Mfg. Company and the Celery-Cola Company made and sold a drink labeled Koke in Birmingham. Pogue was subpoenaed by us and put on the stand. He first insisted on making a statement (Rec., 1854), saying:

"I want to make a statement. I was summoned by the Commissioner the last time that they were taking evidence here, to examine some witnesses for the other side to this case, and, being associated with Mr. Mayfield, I naturally talked to some of them, and I don't think it's really fair myself, to the other side, to allow me to testify in this case. I make that as a claim of personal privilege for myself.

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I began work for the J. C. Mayfield Manufacturing Company in the early part of 1904, and I was with that company and with the Celery-Cola Company until the fall of 1906, I guess it was.

* * * *

(Rec., 1861.) You ask if, during the entire time I was connected with the J. C. Mayfield Manufacturing Company, the Celery-Cola Company here in Birmingham, or the Celery-Cola Company in Missouri, any or either of these concerns made, manufactured, sold, advertised, handled, dealt in or had any advertising matter for, any product with the name of 'Koke'—'K-o-k-e'? Well, I was out on the road some, as I stated, and I can't answer that question. You ask if they ever made, manufactured, sold, advertised, or had any labels, containers, barrels, kegs, or anything else with 'K-o-k-e' on it, as far as I know, at any one of the places, or any of the companies, that I have enumerated heretofore; well, of my own knowledge, I refuse to answer that question—I don't—the position I was in—well, I don't want to answer that question."

If there was such a thing as Koke made by Mayfield or his companies at Birmingham, of course Pogue would have known of it. Why did he not want to answer? If he told the truth and said that there was no such thing as Koke, he would convict his friend and associate Mayfield of perjury and also the witnesses whose testimony he himself had procured. If he had said that there was such a thing as Koke he would have perjured himself, which he was unwilling to do, so he refused to answer, which is a perfectly transparent way of saying that Koke was a myth.

It was, therefore, up to Mr. Mayfield to explain the testimony of his former employes who, though they were about the plant all the time, had never heard of Koke and he did it, in entirely characteristic fashion. (Rec., 2453.) He swears that the draymen and the people about the establishment would not be likely to know what was in

the bottles because the bottles were placed in cases that were stenciled "Celery-Cola."

It was, he explained, "none of their business. And that is where it impressed upon these negroes that they were handling Celery-Cola; if they left out a bottle, the bottle had Celery-Cola, the case had Celery-Cola, stenciled or printed on the side." "The negroes who washed the bottles had Celery-Cola before them from morning till night and the bottler who bottled the goods had Celery-Cola before him." The bottles and cases had Celery-Cola on them and "those negroes thought that everything that went into the cases was Celery-Cola." (Rec., 2454.)

In other words, the people who actually handled the bottles could not tell whether they contained Koke or not, but would be likely to think that it was Celery-Cola because the bottles had Celery-Cola on them.

How does this match with the great particularity with which the Birmingham witnesses offered by the Koke Companies testified about "the little white label with 'Koke' on it in black letters"?

R. J. Baker (Rec., 1302, 1304):

"Koke in black letters he had on it, on the bottles, the bottles had labels on them, the shape of those labels was just on a square paper, and had block letters K-O-K-E."

B. P. McGraw (Rec., 1314) testifying about receiving Koke in 1905 and 1906, says that he got printed Koke labels "about as wide as my two fingers."

W. F. Neal testified (Rec., 1329) that Koke had just a plain label with Koke on it, in black letters, in block type.

Mrs. M. L. Edwards testified (Rec., 1337) that the bottles had a label "hardly as wide as my two fingers." A white label with black letters "K-O-K-E."

H. O. Adams (Rec., 1343) testified that the bottles had a label with "Koke" in black block letters.

E. D. Montgomery (Rec., 1357) testified that at Birmingham they had a small square label, with the word "Koke" in large, black block letters.

A. F. Watkins testified (Rec., 1381) that the "Koke" on the labels was in block letters.

John Smith testified (Rec., 1390) that the bottles had a small label with Koke on it.

C. N. Baker testified (Rec., 1408) that he used Koke labels sent to him by Mayfield. The labels were "as broad as your two fingers."

The truth of this mass of contradictions is accidentally and inadvertently let out by Mayfield. A man named Smith was put on the stand in Birmingham in rebuttal (Rec., 1894.) He met Mayfield on the street and Mayfield said to him:

" 'We are having court up here at the Tutwiler Hotel, I want you to come up there, maybe you can do me some good; We are bottling a drink called "Koke," and I know you have seen the stuff that we bottle, all you have to do is go up there and tell them we have been bottling that stuff.' He handed me a little slip with 'Koke' printed on it."

Providentially the witness preserved the slip and it is in evidence as Exhibit 66. It is illustrated on the opposite page. It will be noticed that it is white, it is about the size that the other witnesses who, no doubt, got these slips in the same way, testified that the Koke labels were. It has "Koke" on it in black block letters. It is about as wide as two fingers.

Even Mayfield did not have the hardihood to go on the stand and identify this slip as one of the labels he used. He said that all his labels were burned up in a fire.

KOKE

In the United States District Court for the
District of Arizona.

The Coca-Cola Company
- Vs -

The Koke Company of America, Et Al.

In the United States District Court for the
Eastern District of Louisiana, Northern Division.

The Coca-Cola Company
- Vs -

Southern Koke Company, Ltd., Et Al.

The Coca-Cola Company
- Vs -

The Koke Company of America

In the United States District Court for the
Northern District of Texas, Dallas Division.

The Coca-Cola Company
- Vs -

The Koke Company of Texas, Et Al.

In the United States District Court for the
Eastern District of Missouri, Eastern Division.

The Coca-Cola Company
- Vs -

J. H. Van Duesen, Et Al.

Opposition No. 1424,

In The United States Patent Office.

Rebuttal
Plaintiff's Exhibit No.

66

offered in

evidence at Birmingham Ala. June 1 1915

Witness

W. M. Smith
J. N. Pettibone

Commissioner:

Record Page No.

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Mayfield admits that he had a conversation with Smith and does not deny giving him the slip and made no explanation whatever concerning it. He denies giving a slip to Bevell, but he had not been accused of that. Besides he says that Bevell, who is a white man, is a negro. (Rec., 2451.) This episode perhaps explains the remarkable unanimity with which the Birmingham witnesses testify that Mayfield's product was labeled K-o-k-e in block letters on a white slip of paper.

The net result is that Mayfield, after procuring a large number of witnesses to swear concerning an alleged label which he evidently devised for the occasion, now gives them all the lie by testifying that the product was in Celery-Cola bottles, in Celery-Cola cases, and that even the draymen and bottlers could not tell whether it was Koke or Celery-Cola, but would naturally think it was all Celery-Cola.

Of course they thought it was all Celery-Cola.

It *was* all Celery-Cola.

“Celery Cola” Is What Was Made Up To 1909.

Mayfield's contention here is that Koke and Coca-Cola are the same (Rec., 1614), and that Koke and Celery-Cola are entirely different.

In his testimony given at Chattanooga on July 5, 1915 (Rec., 2435-2436), he said that Celery-Cola is not made by the same formula as Koke, there is no celery, no prune juice in Koke, and Celery-Cola had more coca leaves in it.

In his testimony in *State v. Rice* in 1907 he said (Exhibit 4, p. 65) that Celery-Cola differs from Coca-Cola because there are celery and other things in Celery-Cola, and Celery-Cola is more exhilarating. This was perhaps

due to the strychnine there was in it. (See Rebuttal Exhibits 12 and 13.)

S. T. Mayfield says (Rec., 1459), that the only difference between Koke and Celery-Cola is that celery extract was added to Celery-Cola.

J. W. Mayfield testified (Rec., 1543-4) that there was a little difference between Celery-Cola and Koke, that Celery-Cola had a little bit of celery in it.

George H. Wilkins (Rec., 878) was told by Van Deusen, who compounds the Koke Companies' product, that:

"About six years ago Mr. J. C. Mayfield came to me and gave me a formula and said he had had more or less trouble with it and asked what I could do with it. I looked it over carefully and told him I thought I could make a good extract out of it. Mr. Mayfield said 'All right, go ahead, I have had so much trouble with it I want to get somebody to put a lot of care and attention to it.' "

And again (Rec., 880):

"I asked Mr. Van Deusen if that was the only place this was sold. He said, 'No, I sell some to the Brewing Company in Danville and Richmond. There it is called Celery-Cola and it is practically the same formula except there is a little more celery added to it.' "

As to the origin of the Celery-Cola formula Mayfield testified in *State v. Rice* (Rebuttal Ex. 5):

"Q. Are you the original discoverer or inventor of those?

A. Yes, sir, in connection with my former partner.

Q. Who was your partner?

A. Old Dr. Pemberton, who is now dead.

* * * * *

Q. When did you first commence using these formulas, Mr. Mayfield?

A. I commenced in a small way about eighteen years ago.

Q. What formula did you write first?

A. It has been this same Celery-Cola formula.

Q. Celery-Cola eighteen years ago?

A. About that time.

Q. Was it called Celery-Cola then?

A. I think so. I got it out, first cola compound made in an extract form.

* * * *

(11) Q. Where did you get this formula from?

A. I, in connection with Dr. Pemberton, originated that formula after months of experience, testing and getting it down.

Q. Experience in what?

A. Experience in testing, making a good many tests.

Q. Had you ever been employed by any of the Cola people in Atlanta or Georgia, anywhere?

(The State objects to the question, and the Court overrules the objection.)

A. Never by the Coca-Cola people.

* * * *

Q. That was the first formula, you say, that you made?

A. Yes, sir.

Q. And you made that when?

(12) A. That has been about eighteen years ago.

Q. You and Dr. Pemberton?

A. Yes, sir."

* * * *

J. C. Mayfield, in this record, speaking of the Koke formula (Rec., 1646), said:

"We do not use the extract of coca. There is now no form of the coca leaf connected with the drink at all. The cocaine is left out and we added something in lieu thereof, that has practically the same flavor as the coca leaf. We added Imperial China tea, flavoring extract. That is the only change. Outside of those two changes there is absolutely no change from the formula that Dr. Pemberton handed over to me in January, 1888."

This change was made after the passage of the Food and Drugs Act of 1906 and must have been in 1908 or '9 (Rec., 2436). Mayfield says:

"I have always adhered to the Koke formula un-

til the passage of the Pure Food Law, when I modified it a little bit so as to comply with that law.”

It is very evident that if Mayfield got anything from Dr. Pemberton, he got a formula for Celery-Cola, and that Celery-Cola was the only drink of this character that he made, up to the time he got into the difficulty with the Government for violation of the pure food law, in 1908 or 1909. (*U. S. v. Mayfield*, 177 Fed., 765.) He states that at that time he made a change in the formula of Koke. (Rec., 2436.) Why should he have made a change in the formula of Koke? The prosecution brought against him concerned Celery-Cola, not Koke. Koke was not involved. The change that Mayfield claims was made, was the change in the Celery-Cola formula, by eliminating the celery, if there ever was any celery in it, and the coca leaves. The name Celery-Cola was abandoned and the product so revised, was, in 1909, christened Koke.

Mayfield himself lets the cat out of the bag, on page 2414 of the Record, where he says:

“The Coca-Cola Company or somebody gave me a black eye with Celery-Cola. It was dragged through the express company, the wholesale company and drug company of New Orleans, and I put the name *Koke*—I was having these names registered in the states. I was kind of afraid of the Federal law, don’t you see?”

Put the name Koke—of course, put the name Koke on his revised Celery-Cola and used it in 1909 for the first time as he swears in his applications for state registrations that he did.

There is no necessity of making any further comparisons or of pointing out the many other contradictions in Mayfield’s testimony and of the many discrepancies between his statement and the statements of his co-swearers. If the foregoing is not enough to brand the claim of Mayfield’s prior use an impudent fiction, nothing can.

And this, under the rule announced by the Supreme Court in *Deering v. Winona Harvester Works*, 155 U. S., 286-300, discredits the whole defense in this proceeding.

If, as seems clear to a demonstration that Mayfield has admitted that there was no use of the word Koke by him or his companies until 1909, no amount of testimony of people who say that they bought it of him or his companies or saw packages labeled Koke by them before 1909 can possibly be true.

That Mayfield's testimony is false and the story that he tells concerning his alleged use of Koke prior to 1909 is fabricated is clear from the foregoing.

Judge Sawtelle in his opinion states:

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendant, Koke Company of America, and its predecessors did not adopt or make use of the name 'Koke' until the year 1909, and the use of said name by said defendant and its predecessors was not sufficient to create any right to its use as against the plaintiff." *Parker v. Stebler*, 177 Fed., 210, 9th Circuit; *The Barbed Wire Patent*, 143 U. S., 275; *Deering against Winona Harvester Works*, 155 U. S., 286.

Judge Sawtelle has held (and Judge Foster came to the same conclusion) that there was no use of the word Koke prior to 1909, and it would seem from an examination of the foregoing comparisons that this conclusion must be reached. Such is the inevitable logic of the facts. The minute Mayfield admits—as he has by his testimony, in *State v. Rice*, that he was not using the word Koke in 1907, and his repeated declarations under oath, in his appli-

cations to register the word Koke in the states, that its first use was in 1909, no amount of testimony of people who say that they bought it of him, or his companies, or saw packages labeled Koke before 1909 can possibly be true. This is the rule announced by this court in *Parker v. Stebler*, 177 Fed., 210, 212. The position is very clearly taken by the Court of Appeals of the District of Columbia in *Alexander v. Blackman*, 26 App. D. C., 541; 1906, C. D., 602, where Mr. Justice Duell said:

“Unless we can credit Alexander’s testimony we cannot credit that of his witnesses. His testimony is the cornerstone of the arch and if it falls the testimony of the others falls with it. We do not mean to say that his uncorroborated testimony as to prior possession of the invention would be sufficient. Rather, if his story is untrue the testimony of the others amounts to nothing, and they have either testified falsely, or have been persuaded into believing that the dates he gives are the correct ones, when, as a matter of fact, they are mistaken as to dates and have been led into very grave errors, to put it mildly.”

The rule firmly established in patent cases that proof of prior use of the invention must be certain beyond a reasonable doubt, applies with double force in a case such as this.

W. A. Gaines v. Rock Springs Distillery Co.,
226 Fed., 531.

Barbed Wire Patent, 143 U. S., 275, 284.

Telephone Cases, 22 Fed., 309; 25 Fed., 725; 126
U. S., 1-565.

Dodge v. Post, 76 Fed., 807.

In this case Mayfield is unable to produce a single label, advertisement, price list, billhead, order blank or any printed or written matter whatsoever bearing the word Koke which dates before 1909. He claims to have manufactured his goods under the name Koke first in

Atlanta, then at Birmingham, then in Nashville, then in St. Louis and then in Shreveport.

Mayfield has produced in support of his assertions his three sons, who corroborate his statements, and a number of people connected in some way with him by bonds of interest or friendship, and some other who testify very indefinitely either to purchases of Koke from Mayfield or his companies, or to seeing receptacles labeled Koke at some place occupied by them. None of these witnesses is able to produce a single piece of documentary evidence or a label, bill, letter or anything bearing the name Koke and pretend to testify solely from memory.

It is the rule of all the authorities that oral testimony is not sufficient to discharge the burden of proof imposed on one claiming anticipation.

Deering v. Winona Harvester Works, 155 U. S., 286.

Parker v. Stebler, 177 Fed., 210.

H. Mueller Mfg. Co. v. Glauber (C. C. A., 7th Circuit), 184 Fed., 609, 618.

Mast, Foos & Co. v. Dempster Mill Mfg. Co. (C. C. A., 8th Circuit), 82 Fed., 327.

National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed., 693 (C. C. A., 8th Circuit).

Bowers v. San Francisco Bridge Co., 91 Fed., 381, 408.

Torrey v. Hancock, 184 Fed., 61, 67.

Kraatz v. Tieman, 79 Fed., 322, 323.

Underwood Typewriter Co. v. Elliott-Fisher Co., 165 Fed., 927.

Beckwith v. Malleable Iron Co., 174 Fed., 1001.

United Shirt & Collar Co. v. Beattie, 149 Fed., 736.

Merrimack Mattress Co. v. Brown, 122 Fed., 87.

Timolat v. Philadelphia Pneumatic Tool Co.,
123 Fed., 899; 131 Fed., 257.

Albright v. Langfeld, 131 Fed., 473.

Kansas City Hay Press Co. v. Devol, 81 Fed., 726.

Untermeyer v. Freund, 58 Fed., 205.

Mack v. Optical Co., 52 Fed., 819.

Flomerfelt v. Newwitter, 88 Fed., 696.

Moore on Facts, Sec. 46 and cases cited in notes
174, 175, 176, 177 and 178.

The non-production of specimens of a product alleged to be made in great quantities is always a suspicious circumstance.

Brooks v. Sacks, 81 Fed., 402 (C. C. A., Third Circuit).

Celluloid Mfg. Co. v. Russell, 37 Fed., 676, 678.

American Bell Tel. Co. v. Molecular Tel. Co.,
32 Fed., 214, 220.

On the assumption that all of the witnesses who testified to having seen or purchased Koke honestly believed that they testified truthfully, it should always be borne in mind that the human memory is a fickle thing, especially as to unimportant matters and dates. Judge Dean, speaking for the Supreme Court of Pennsylvania, in *Miller v. Cohen*, 173 Pa. St., 488, 34 At., 219, 220, said:

“No one with opportunity for observation of judicial proceedings has failed to notice the lamentable infirmity of human recollection.”

Pettibone v. Pennsylvania Steel Co., 133 Fed.,
730, 735.

The alleged facts testified to in this case are more or less remote. Professor James in his “Principles of Psychology,” Volume 1, page 670, observes:

“Other things being equal, at all times of life recency promotes memory.”

Courts never repose implicit confidence in statements of witnesses regarding remote transactions. This is particularly so where dates are important.

Moore on Facts, Sec. 749.

Russell v. Baptist Theological Union, 73 Ill., 337, 340.

Wing v. Richardson, Fed. Cas., 17,869.

In Re Williams, Fed. Cas., 17,709.

An interesting discussion on fallability of memory for dates and times is found in *Moore on Facts*, Sec. 845.

In addition to the inevitable and inherent inaccuracy of human memory with respect to dates and times, where it can be shown that the matter concerning which the witness is testifying is of no particular importance to him at the time of his alleged observation of it and was one to which he would not be likely to pay special attention, his testimony is little short of worthless because attention and observation are conditions precedent to any recollection at all.

See James, *Psychology*, Vol. 1, pp. 403-427; *Moore on Facts*, Sec. 767, for an elaborate discussion.

Kraatz v. Tieman, 79 Fed., 322, 323.

Mack v. Spencer Optical Co., 52 Fed., 819.

In this case the witnesses produced to prove use of Koke by Mayfield were many of them related to him by blood, friendship or interest and were evidently carefully tutored.

“Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information”

said Mr. Justice Brown in the *Barbed Wire Patent*, 143 U. S., 275, 284.

Hershey v. Blakesley, 33 Fed., 922, 924.

Moore on Facts, Sec. 815.

Mayfield's fanciful tale of part ownership in Coca-Cola and knowledge of the formula derived from Dr. Pemberton, even if the violent presumption is entertained that it is not deliberately perjured, can be explained by Lord Romilly's statement in *Pierce v. Bradley*, 23 Beav., 64, 71; 53 Full Reprint, 25, 28:

"It frequently happens that a person, by long dwelling on a subject, thinks that a thing may have happened, and he at last comes to believe that it actually did occur."

This is particularly true where a piece of property has enormously increased in value. In *Russell v. Miller*, 26 Mich., 1, 16, Judge Campbell remarked:

"This tendency is so familiar that we can put little reliance on the acts or statements made after the value has begun to increase."

There have already been cited a number of cases having to do with the telephone patents. It is a matter of common knowledge that after Bell's invention in 1876 a large number of persons appeared who claimed to have invented the same thing many years before, and fortified their claims literally by clouds of witnesses, who testified, with apparent sincerity, that they had seen, used and talked over an operative telephone in the '50s and the '60s and long prior to Bell's invention. Drawbaugh's claim was supported by the testimony of five hundred such witnesses.

American Bell Telephone Co. v. People's Telephone Co., 22 Fed., 309.

American Bell Telephone Co. v. American Cushman Telephone Co., 35 Fed., 734.

Moore on Facts, Sec. 1049.

And it is quite possible to say that there is no necessity of imputing perjury to some of the people who testify that they saw receptacles labeled Koke about Mayfield's

place of business or purchased Koke from him or his companies from time to time. The testimony is unsatisfactory and may properly be ignored, because it attempts to establish by memory alone, remote facts exciting no particular attention at the time of their occurrence.

With regard, however, to the testimony of J. C. Mayfield and his three sons, the case is different. These men testify unanimously and with great positiveness to a constant, continuous and extensive use of the word Koke as a trade-mark for a beverage from 1888 to the present time. Their testimony is evidently concerted. They profess to rely on memory alone. They produce nothing of documentary character dating before 1909, not a scrap of paper, not a book entry, not a label, not an advertisement, not a letter—nothing on which the word Koke appears in any manner or form.

Everything of the sort, they testified, was lost or had been destroyed. At this same time a man named Pogue was engaged by them in rounding up such witnesses as were willing to swear for them. (Rec., 1862.) He had been an employe of Mayfield's Birmingham establishment. Pogue was served by us with a *subpoena duces tecum*, issued under an order of the District Court at Birmingham, Alabama. In response to this subpoena he produced more than a hundred letters which had been in his possession all the time, written to him by Mayfield on the stationery of the J. C. Mayfield Manufacturing Company and the Celery-Cola Company during the time when he swore he was selling Koke in great quantities. *In not one of these letters and on not a single letterhead does the word Koke appear.*

Pogue testified (Rec., 1864):

"I haven't any idea in the world how many letters, papers and things I think I have examined. I imag-

ine it is a hundred or more. I noticed the printed matter on the letters or documents as I was running through. No, sir, the name 'Koke'—'K-o-k-e' did not appear on a single solitary one of them.

(Page 1876:)

No, sir, there is not a single letter that I have examined that has got the name 'Koke'—'K-o-k-e' on it, or in it. That includes those I have identified for this record and those I have examined here, but which have not been put into this record."

The letters are detailed and intimate, they mention other drinks, but not Koke. The query is pertinent why did not Mayfield produce them—they certainly were in existence, and he must have known of them because he and Pogue were at that very time together, working up the testimony in this case. (A portion of those letters are in evidence as Rebuttal Exhibits 11 to 60.)

These letters throw an interesting sidelight on the character of the man Mayfield and are highly material on his credibility. They are intimate documents, written to his business associate and reveal the man as he is. They show him to be a visionary and dishonest schemer, an illiterate and a person without morals or character.

In addition, the witness Bevell, who was interviewed by Mayfield, was later called on behalf of The Coca-Cola Company and produced advertising matter and order books used during the period of alleged use of Koke, but the word Koke nowhere appears.

Mayfield and his sons cannot be excused, as can their co-swearers, on the ground of honest mistake. It is the testimony of J. C. Mayfield which must be scrutinized.

The three sons are simply swearing in corroboration of their father, and if J. C. Mayfield testified falsely, necessarily the sons do.

Attention has already been called to the glaring inconsistencies in their testimony. It is appropriate here to point out that this case is one where there is a peculiar temptation to perjury. The stake is large. The alleged events on which Mayfield's adverse claim is based are remote. Many of the actors in it are dead and with respect to many of the circumstances it would be impossible to contradict any statement Mayfield might choose to make. As Mr. Justice Brown stated in *The Barbed Wire Patent*, 143 U. S., 275:

“The situation opens wide and dangerously the door to perjury and the fabrication of the evidence.
* * * One may easily conceive of instances in which to support a case of prior conception of an invention evidence that it would be impossible to meet or discredit might be falsely devised.”

In the general situation in this case there is enough of a foundation on which to rear a superstructure of falsehood. Dr. Pemberton concededly was the inventor of Coca-Cola and its first manufacturer, and J. C. Mayfield concededly was at one time associated with him and has been for years in the business of manufacturing proprietary articles, among other things, soft drinks. It is stated in *Moore on Facts*, Sec. 1055:

“It is probably within the experience of every trial lawyer and of every judge that willing witnesses, and even corrupt ones, unless they are phenomenal falsifiers, have a foundation of fact upon which they build their fabrications, and that their fabrications are apt to consist of distortions of the actual facts. It arises therefore out of the very nature of perjury that it must be confirmed to a certain extent.”

It will be noticed that Mayfield's testimony contains in abundance those things which to the experienced man are earmarks of perjury. There is a copiousness of detail concerning circumstances which are incapable of contradiction, but there is a remarkable economy of de-

tail concerning those things which can be investigated and contradicted.

The language of Mr. Justice Grier of the Supreme Court in *Luco v. United States*, 64 U. S., 515, 535, is suggestive:

“Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness whose willingness to oblige his friend exceeds his judgment will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that he ‘does not recollect.’ ”

The most casual examination of the testimony of all the Mayfields shows that there is copiously present this earmark of falsehood. They all testify that Koke was made in large quantities and bore labels and was sold generally. They can produce no label. They cannot recollect and they cannot name a single customer who ever bought any. “I do not remember” is the invariable answer of all of them when asked to be specific. S. T. Mayfield made this answer one hundred and forty-six times in the course of his cross-examination and the other Mayfields are equally noncommittal. This in itself is enough to discredit their testimony entirely, apart from contradictions to which attention has been called, and which we believe show them all to be guilty of willful and corrupt perjury.

It is evident from the record in this case that J. C. Mayfield has endeavored to repeat the performance of

which he was guilty in the suit in St. Louis between his company and the Celery-Cola Company.

In that case one of Mayfield's Companies got into litigation over the trade-mark "Celery-Cola." The defense was made that the complainant did not come into equity with clean hands because, it was asserted that the product contained no celery and did contain deleterious ingredients, namely, strychnine and cocaine. Mayfield evidently sought counsel's advice and got it in a letter which may mildly be characterized as an indiscretion.

This letter (Rebuttal Exhibit 13), which is here reproduced, was transmitted by Mayfield to Pogue, and demonstrates that the manufacture of evidence is no novelty with this individual.

J. N. Littlebaum Esq. 6/1/11
 SPECIALTY:—PATENTS, TRADE-MARKS, COPYRIGHTS.

13

F. T. F. JOHNSON,

ATTORNEY-AT-LAW,

McGill Building.

WASHINGTON, D. C., Dec. 1, 1911.

J. J. Haviland, Esq.,
 Birmingham, Ala.

Dear Sir:—

Your favor of the 29th. inst., received and contents carefully noted, also the letter of your St. Louis attorney.

It is absolutely necessary that your beverage "JELLY-COLA" should contain both Celery and Cola, and the fact that it contains additional ingredients greatly strengthens your case. Even if your mixture should contain Nuxvomica I cannot see that this would affect the case in the least. It is true that Nuxvomica is a poison, as are all other drugs, but it is also true that it is one of the best and most effective ingredients of "tonics" usually prescribed by physicians. The fact that your beverage contain cocaine should not affect your trade-mark rights, but in view of the great howl that is now going around the country concerning beverages and patent medicines, I would advise that any analysis that you may have had of your beverage should fail to show the presence of that drug. I would, therefore, advise that you make up a vat of your beverage increasing the quantity of celery and leaving out the cocaine. Then take samples of the beverage from this vat and have them analysed. Attend to this matter yourself, and have one of your employees, whose business it is to bottle the goods take the samples from this tank, so that he can be put on the stand as a witness and testify that the samples were taken from the tank or tanks from which the beverage sold to the trade was taken.

Your testimony must show positively that your beverage contains both celery and cola, and that in addition to these two it contains 15 or 13 other ingredients. It would be well to give the names of four or five of the other ingredients. As I do not know that the ingredients are I cannot advise which you should name, but your chemist can probably advise you on this point. It is neither necessary nor advisable to name all of the ingredients, and if the formula is a trade-secret no Court would compel you to divulge it. If, however, any of the ingredients or drugs used in the beverage combine to form a chemical composition I would

W. Pittsman 6/1/15.
SPECIALTY-PATENTS, TRADE-MARKS, COPYRIGHTS.

F. T. F. JOHNSON,

ATTORNEY-AT-LAW,

McCall Building.

J. C. Mayfield-----2.

WASHINGTON, D. C. 150

name such drug, and the composition so formed (provided that such composition is not a harmful one). This matter should be gone over very carefully before your testimony is given.

Harvey W. Wiley is the name of the Chemist of the Agricultural Department, and his address is 1814 10th. Street, N. W., Washington, D. C.

The Certificate of Registration that I sent you some time ago will show the date (1908) that Mr. Mayfield commenced to use Mark. However, I herewith inclose a carbon copy of the Statement made by Mr. Mayfield as to the use of the trade-mark.

The trade-mark "Celery-Cola" indicates to the purchaser that the beverage contains, among other ingredients, Celery and Cola, and I am, therefore, of the opinion that any analysis that will show, or rather fail to develop either celery, or cola, or rather both of them, would prove fatal to your case, as the mark would be held to be deceptive, and you would in all probability be thrown out of Court on the grounds that you were deceiving the public. Therefore you must prove beyond doubt that both Celery and cola are present in the beverage, and if so doing do not fail to bring out the fact that there are other ingredients in the mixture.

As I have not seen a copy of your bill against the Celery Cola Co. nor a copy of their answer thereto, I am unable to advise you any further than I have above.

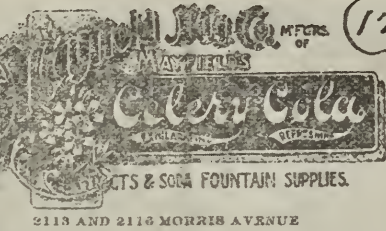
I can give my attendance and assistance at the trial on January 3rd at St. Louis, if such is the wish of Mr. Anderson and yourself. If you wish me to go to St. Louis you will please send me an amount sufficient to cover my expenses to and from St. Louis, and my expenses while in that city.

I herewith return the letter from Mr. Anderson to you.

Very truly yours,

F. T. F. Johnson

N. B. In the meantime I will look up the law covering this case, as directed. *F. T. F. Johnson*



BOTH PHONES 823

BIRMINGHAM, ALA., Dec. 10, 1901.

Dear Mr. [unclear]:

I am expressing you the box of extracts. I hope you will find it useful. I personally supervised the shipping of this box. Now, if you want your express to Baxter or any one else, wire me and I will get it of promptly.

Enclosed find a letter from our atty. in Washington, D. C. (the man that secured the trade mark) I am in favor of having him associated with Mr. Johnson - it will be a little expensive, but we will win this case, for Coca-Cola is a [unclear].

Tonight Mr. Johnson might call. Show him the letter from Mr. [unclear] and [unclear] once. It's important that we do all we can to win our case. I will write Mr. Johnson this [unclear], and keep you posted.

Write me later.

Yours truly,
J. C. Mayfield

Johnson thinks we ought to mention 3
4 other things - we could mention Vanilla
extract & [unclear] "Red" Coffee. Brown Quince
Lime Juice etc.

The box C. C. shipped today is marked 

So that you may know this is the box
you want have your clients look for Red
& Cola - They will find 18 signatures of [unclear]

could multiply but they are all in small quantities.

This past history is illuminative of Mayfield's disposition and has a distinct bearing on the credibility of his story in this case.

"This unconscionable act on the part of this witness goes far in my estimation to create doubts as to his integrity and, of course, operates to throw doubt upon his truthfulness."

Blodgett, J., in *Smith v. Davis*, 34 Fed., 783, 785.

"Of course, those who would commit such a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborn by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud."

Mr. Justice Blatchford in *In re Goodridge*, Fed. Cas. 5547, p. 614.

The demonstrated perjury of Mayfield himself and the highly suspicious character of the testimony of his co-swearers in this case indicate a repetition here of the reprehensible conduct clearly shown to have occurred in other litigation to which he was a party.

In addition to discrediting the guilty parties as individuals and rendering them unworthy of belief, the fabrication by a party to litigation of a cause of action or a defense is the strongest admission by conduct that no real cause of action or defense exists.

As was stated by Lord Cockburn in *Moriarity v. London, Chatham & Dover R. Co.*, L. R. 5 Q. B., 314, 22 L. T. (N. S.), 163, 166:

"The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense taken, if he is defendant, is an honest and just one; * * * here, if you can show that a man has been suborning false testimony and has endeavored to have recourse to perjury, it is strong to

show that he knew perfectly well that his cause was an unrighteous one; * * *."

In *Baltimore & Ohio R. R. Co. v. Rambo*, 59 Fed., 75 (Circuit Court of Appeals, Sixth Circuit), Judge Taft remarked:

"It is quite true that it was competent for the plaintiff to introduce evidence in rebuttal, tending to show that the authorized agent of the Baltimore & Ohio Railroad Company had been engaged in suborning witnesses to testify falsely. Such evidence was relevant on the main issue as tending to show an admission by its conduct that it had a bad case, needing false and perjured evidence to support it."

The Supreme Court of the United States has announced a similar rule in *Deering v. Winona Harvester Works*, 155 U. S., 286, 300. It appeared that certain doubtful testimony had been secured by an agent of a concern which was interested in defeating the patent in suit. Mr. Justice Brown said:

"This entire evidence, taken in connection with certain damaging admissions made by Heller as to the compensation he received, both for his testimony in this case and for his concealment of certain facts in relation to another patent, throws discredit upon the whole case made by the defendant with respect to the anticipation of the Stewart patent."

The general flavor that conduct of this sort gives to the side of a case guilty of it is well summed up by Chief Justice Bigelow in *Egan v. Bowker*, 5 Allen (Mass.), 449, 452:

"The inference is a reasonable and proper one, that a person having an honest and fair debt which he claims to be due will not endeavor to support it by falsehood and fraud; and the fact that he resorts to such means of proof has a tendency to show that he knows he cannot maintain his suit by evidence derived from pure and incorrupt sources. Truth does not ally itself with falsehood, but falsehood will

often endeavor to make it appear that truth is on its side.”

Bennett v. Susser, 191 Mass., 329; 77 N. E. Rep., 884.

Moore on Facts, Sec. 589, 590.

People v. Arnold, 43 Mich., 303; 5 N. W., 385.

Van Voorhis v. Van Voorhis, 94 Mich., 60; 53 N. W., 964.

Georgia R. Co. v. Lybrend, 99 Ga., 421, 435; 27 S. E., 794, 798.

Richardson v. State, 90 Md., 109; 44 Atl., 999.

Snell v. Bray, 56 Wis., 156; 14 N. W., 14.

Hinshaw v. State, 147 Ind., 334; 47 N. E., 157, 166.

Mayfield testified that he could recollect the names of only a few of his ex-employees who were about his place of business when the enormous amounts of the product labeled Koke are alleged to have been made by him. Within a month after Mayfield testified, The Coca-Cola Company located twenty-one of them and took their depositions—no one of them had ever heard of Koke. They were equally available to the Koke Companies and were not called. This failure to produce as witnesses persons who could shed light on the facts is suspicious. This rule is applied in trade-mark cases.

Atlantic Milling Co. v. Robinson, 20 Fed., 217.

Atwood-Morrison Co. v. Sipp Electric & Machine Co., 136 Fed., 859.

American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed., 976, 1018.

Bettendorf v. J. R. Little Metal Wheel Co., 123 Fed., 433, 435.

Acme Flexible Clasp Co. v. Cary Mfg. Co., 101 Fed., 269.

It seems clear, therefore, even if the impossible concession be made that Mayfield is unimpeached, the testimony given by the witnesses called by the Koke Companies in support of the contention that the word Koke has been continuously used by them and their alleged predecessor, Mayfield, since 1888 abounds in such improbabilities and is so saturated with the things which prompt courts to disbelieve evidence, however positive and by whatever number of witnesses given that the defense here is inherently incredible. But when, as in this case, such evidence as is here adduced by the Koke Companies, is used as corroborative of the fantastic story of the party most interested in their success—whose testimony was disbelieved by Judge Sawtelle and Judge Foster on the same record here before this court, an individual whose demeanor on the witness stand is characterized by the Examiner of Interferences in the Patent Office by the words “he apparently attached no importance to the fact that he was testifying under oath,” this would seem to be a case for the application of Lord Stowell’s dictum in *The Odin*, 1 C. Rob., 248, 252 (quoted in *The Dolphin*, 7 Fed. Cas., 3795):

“It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment.”

(b) The Koke Companies asserted title to Koke and Dope by assignment.

There remains to discuss only the alleged acquisition of the trade-mark Koke from the Murfreesboro Bottling Works and W. L. Bitting and the Dope mark from Houpert & Worcester. It can hardly be contended that any right was obtained by reason of these assignments. It is clear that in these transactions no business or good will was taken over, that the sales were sales of a naked symbol and as such confer no right on the assignee, and

that the transactions were a part of Mayfield's fraudulent scheme to claim some sort of right in the names Koke and Dope is evident.

(1) Murfreesboro Bottling Works.

It appears in this case that the Murfreesboro Bottling Works, Christy and Huggins, proprietors, caused the registration of the work Koke in script in the Patent Office of the United States on August 21, 1906, as a trade-mark for beverages. The certificate is number 58,878.

Christy and Huggins, proprietors of the Murfreesboro Bottling Works, were called in rebuttal (Rec., 2005, 2027). They testified that they adopted the name Koke because it was a well known and recognized nickname for Coca-Cola; that they were trying to imitate Coca-Cola and get a product as close as they could and that the script was used for the word Koke to make the label look like Coca-Cola. They admitted the sale of the trade-mark only to Mayfield. No business of any sort was turned over and they denied categorically Mayfield's statement that he said anything about any previous use of the word Koke by him.

(2) W. L. Bitting.

The transactions with W. L. Bitting of Sherman, Texas, involved two registrations, one a label or copy-right registration of the word Koke applied to a chemical compound (Number 56923, Rebuttal Exhibit 80), and another of a later date of the word Koke as a trade-mark for a beverage or syrup, the word Koke appearing in block type. (Certificate Number 94689, Jan. 13, 1914, Rebuttal Exhibit 81.)

It appears in rebuttal, by the testimony of Haizlip and Penland, who had been Bitting's employes (Rec.,

1950, 1977) that W. L. Bitting was a druggist in Sherman, Texas; that he was one of the first handlers of Coca-Cola in Sherman and that Coca-Cola was known and asked for at Bitting's fountain as early as 1893 as Koke; that Bitting got into some sort of a controversy with The Coca-Cola Company, who declined to give him the exclusive sale of its product in Sherman, Texas; Bitting thereupon began experimenting with an imitation of Coca-Cola and was trying to sell it; that he used the name Koke as applied to an adulterated cocaine which he was selling. This doubtless is the "chemical compound" referred to in the label registration.

The purchases from the Murfreesboro Bottling Works and Bitting are aptly characterized by Judge Sawtelle as follows:

"I find that the purchase of the trade-mark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with the knowledge that same was being used to imitate plaintiff's product and were acquired not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola."

Judge Foster concurs in this conclusion.

The Examiner in the Patent Office from the same record here before the court, sums up these transactions as follows:

"In 1911 Mayfield learned that the Murfreesboro Bottling Works, of Murfreesboro, Tennessee, was carrying on some kind of a business under a registered trade-mark 'Koke.' (Applicant's Rec., p. 789.) Mayfield's company purchased that registration for a material consideration (Defendant's Exhibit No. 67) without entering into any contest, although Mayfield claims to have used the name 'Koke' as a distinguishing mark for his goods continuously since the year 1888. The earliest date of use alleged in the

Murfreesboro registration is May 1, 1902. (Defendant's Exhibit No. 129.) Mayfield admits that he took nothing from the Murfreesboro Bottling Works, as a result of this transaction, other than the certificate of registration. The business and formulae were not transferred. (Applicant's Rec., pp. 860 and 923.)

In 1913 Mayfield was notified that an application for registration of the word 'Koke' as a trade-mark for a non-alcoholic beverage, was being prosecuted before the U. S. Patent Office by one William L. Bitting of Texas. Instead of contesting an interference with Bitting, whose earliest alleged date of use was November 10, 1898, Mayfield's Company bought Bitting's application and had the mark registered to the Koke Company of America as assignee. (Applicant's Rec., pp. 829, 830, 923; Defendant's Exhibits No. 126 and No. 128.) That applicant took nothing from Bitting in the nature of apparatus, labels, formulae or other tangible assets, is admitted. (Applicant's Rec., pp. 921, 922.) Applicant purchased nothing but the bare application for trade-mark registration together with a label registration owned by Bitting. (Defendant's Exhibit No. 126 and No. 127.)

* * * *

That the applicant acquired nothing by the purchase of the bare trade-mark registration and application for registration, one from Murfreesboro Bottling Works and the other from Bitting, cannot be seriously questioned. It is so well settled that a trade-mark cannot be transferred, independently of the business and good will in connection with which it has been used, as to render further discussion or the citation of authorities unnecessary."

This rule is elementary and is sustained by all the cases.

Bulte v. Igleheart Bros., 137 Fed., 492, 498; *Cotton v. Gillard*, 44 L. J. Ch., 90; *Croft v. Day*, 7 Beav., 84; *Robertson v. Quiddington*, 28 Beav., 529; *Singer Manufacturing Company v. Loog*, 8 App. Cases, 15; *Gegg v. Bassett*, 3

Ont. L. Rep., 263; *Kidd v. Johnson*, 100 U. S., 620, 25 L. Ed., 769; *Brown Chemical Company v. Meyer*, 139 U. S., 540, 11 Sup. Ct., 625, 35 L. Ed., 247; *Chadwick v. Corell*, 151 Mass., 190, 23 N. E., 1068, 6 L. R. A., 839, 21 Am. St. Rep., 442; *Congress, etc., Spring Company v. High Rock Congress Spring Company*, 45 N. Y., 291, 302, 6 Am. Rep., 82; *Independent Baking Powder Company v. Boorman*, 175 Fed., 448, 450; *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed., 468, 474; *Messer v. The Fadettes*, 168 Mass., 140; 46 N. E., 407; *Morales v. The Fair*, 82 Ill. App., 499; *Browne on Trade-Marks*, Sec. 363; *Sebastian on Trade-Marks*, 11; *Kerly on Trade-Marks*, 272; *McVeagh v. Valencia Cigar Factory*, 32 O. G., 1124; *Price & Stewart*, 970; *Witthaus v. Braun*, 44 Md., 303; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas., 523, 532; *Morgan v. Rogers*, 19 Fed., 596; *Eiseman v. Schiffer*, 157 Fed., 473, 476.

(3) The alleged acquisition of the Dope mark from Houppert and Worcester.

Houppert and Worcester were a bottling firm in Nashville. They adopted, as a name for a beverage, the word Dope and caused it to be registered as a trade-mark for beverages in the Patent Office on June 4, 1907, Number 63033. This registration was purchased by Mayfield and Mayfield, a firm consisting of J. C. Mayfield and his son S. T. Mayfield, and afterwards assigned to the Koke Company of America. That no business was transferred from Houppert and Worcester to Mayfield and Mayfield is evident.

Al. E. Campbell (Rec., 1363), Secretary and Treasurer of the Birmingham Bottling Company, testified that the firm of Houppert and Worcester, making soda waters in Birmingham, consisted of P. L. Houppert and Sam H. Worcester. Houppert and Worcester were succeeded

by Houppert and Smyly, the National Dope Company and Birmingham Bottling Company, successively. The details are to be found in the testimony of Campbell (Rec., 1365) and E. J. Smyly (Rec., 1392 and following). P. L. Houppert died October 8, 1911. Campbell and a man named Frank Seiver were appointed administrators of his estate on October 1, 1911.

The recitals in the documentary exhibits offered by the Koke Companies in proof of this transaction are widely variant from the facts as testified to. But however that may be, it is clear the pretended assignment was a nullity.

The transaction is described by Mr. Campbell in his deposition taken on behalf of the Koke Companies. (Rec., 1370-1372.) Campbell states that the certificate of registration was all Mayfield wanted, and that was all that was sold, or was intended to be sold to him as a matter of fact. That no business was turned over it was necessary to go through with the elaborate performance of contracts and the recitals in them to satisfy lawyers.

Houppert & Worcester continued the sale of a product under the name Dope after the pretended assignment and continued business just as they had before (Rec., 1375) and their successors are still using the name (Rec., 1372, 1376).

It is a fair inference that the word Dope was adopted by Houppert and Worcester because it was known to be a Coca-Cola nickname. (Rec., 1399.)

The same rule of law applies here as in the pretended Koke transfers.

A mark fraudulent in inception and use is attempted to be bought by means of a void transfer by an unfair trader to further his fraudulent schemes. The comments of Judge Sawtelle properly characterize the transaction and the authorities cited are decisive of it.

This closes the discussion of the case as far as it concerns any affirmative right in the words Koke and Dope in the Koke companies. There remains to consider the contention that the words Koke and Dope may be used because they are descriptive terms and refer to any soft drink.

Before discussing this defense,—that the names Koke and Dope are generic terms for soft drinks generally, which may be used by anybody,—it is well perhaps to have two things in mind. First, that this defense is wholly inconsistent with the claim of exclusive right in these words asserted by the Koke Companies and demonstrates the lack of good faith in their representations to the trade that the words Koke and Dope are their trade-marks, and that to sell anything in response to requests for Koke or Dope but the Koke Companies' product is unfair, unlawful and in violation of the Federal Statutes; and, second, to consider for a moment the character of the persons who give the testimony upon which is based the contention that the names Koke and Dope are generic and descriptive.

Among the trade witnesses who were called in the attempt to prove that the words Koke and Dope mean, not Coca-Cola, but any soft drink, are included a large number of saloonkeepers and bartenders, at least two convicts, one infringing manufacturer now under injunction for piracy upon the Coca-Cola trade-mark, and three other persons enjoined by Federal Courts for fraudulent trade practices in passing off imitation products upon calls for Coca-Cola, five persons who have confessed in writing to be guilty of similar practices and thirty others against whom the same offense is proved. There is a detailed consideration of the testimony of these witnesses at the conclusion of Schedule II.

The trade witnesses called by The Coca-Cola Company testified that for many years Coca-Cola has been familiarly known to them and to their customers under the nicknames Koke and Dope, and that these names are understood to refer to and designate Coca-Cola only. These people are responsible business men of standing and experience. The trade witnesses called by the Koke Companies were not only much fewer, but were not nearly as well qualified to speak.

(2) **The defense that Koke and Dope are generic terms which may be used by anybody.**

In their attempt to establish this defense the Koke Companies called two classes of witnesses, fountain attendants and saloonkeepers and bartenders. The general attitude of the latter on the subject of soft drinks may be summarized by the statements of some of them.

A. A. Stanley, of Chattanooga (Rec., 1004): "I never drink anything but whiskey."

W. J. Finmin, who has a saloon in Commercial alley in New Orleans (Rec., 1564):

"I said to one of my customers," he testified concerning Coca-Cola, "I wondered how the dickens he liked so damn much of that stuff all day long."

M. J. Costello, Chattanooga, Tenn. (Rec., 1000): "I never drank any of them. I sometimes used them for a chaser."

It is not unnatural that bartenders and near-beer vendors in prohibition districts should regard anyone asking for a soft drink in their places of business as a harmless lunatic and entitled to no consideration and that they should give in response to calls for Koke and Dope anything from Coca-Cola to white pop—the first and cheapest thing they could get their hands on.

Of course, as "experts" these men are worthless. One of them was frank enough to say:

Luke Pogue (Rec., 1061):

"In the beer business it is different from the soda business. Take a fellow who drinks beer and whiskey and wants to get on the 'water wagon.' He might want Poinsetta and say he is drinking 'Dope' or soda water or anything like that is 'Dope' with him."

Why a group of men whose only connection with the soft drink trade is incidental and reluctant should be called to advise the court as experts is incomprehensible, except on the ground that reputable men who know the business are unwilling to subscribe to views which would help our adversaries' case.

The other class of witnesses produced are druggists, most of whom are guilty of acts of fraud similar to those of which the Koke Companies are accused, namely, substitution and passing off.

The testimony of the first class of witnesses—the saloonkeepers—is, of course, worthless. They do not know what they are talking about, and as a help to the court, their testimony is of no consequence whatever, but both they and the second class of witnesses have their views colored by interest.

It is a fact, as this record clearly shows, that in spite of all the efforts of The Coca-Cola Company to suppress them, there are innumerable imitations of Coca-Cola upon the market. Without exception these imitations taste as much like Coca-Cola as it is possible to make them, and are indistinguishable from Coca-Cola in appearance. They are given various names, to a greater or less extent, imitating the name Coca-Cola. They are sold to the dealers at a cheaper price than Coca-Cola and their sale produces a greater profit. These products are not desired by the public and are unknown. They are

seldom or never called for by their own names. This fact is clearly established by the testimony. For example—

C. H. Jouett, with the Live and Let Live Drug Company, St. Elmo, Tenn., a witness for the Koke Companies, testified as follows (Rec., 1059):

“I never heard customers ask for Ko Nut.”

The way Ko Nut is sold is shown by the testimony of J. E. Jones, a druggist of Hattiesburg, Miss., one of the Koke Companies’ witnesses (Rec., 1800, 1801):

“When customers came to my fountain first prior to the time I handled Konut and made a request for a drink of Koke or Dope I serve them Coca-Cola. I never handled any other drink but Coca-Cola. At that time I understood they wanted that. Konut syrup costs a dollar a gallon. Coca-Cola a dollar and a half. The difference in price is the reason I handled it.

* * * * *

When a customer comes in and asks for a Dope or Koke I thought when I give him any cola drink I was in my rights. I did not know what the customer wanted in my mind. I just gave him the cola product I had, the cheaper product. Any man is in business for his profits.”

R. W. Elliott, a witness for The Coca-Cola Company, in charge of the Van Antwerp Drug Store soda department, in Mobile, testified (Rec., 566):

“I don’t believe I ever did hear of a man ordering any other cola drinks. I have heard of other cola drinks, but I have never heard a man ask for another cola drink over the fountain.”

George L. Seibert, soda dispenser for Dave S. Bauer, druggist, in Mobile, Ala., testified (Rec., 554):

“I have never heard anybody ask for any other cola drinks than Coca-Cola.”

Dave S. Bauer, druggist, of Mobile, Alabama, testified (Rec., 543):

“I have never heard of anyone asking for ‘Wise

Ola,' 'Ala Cola,' 'My Coca,' 'Rye Ola,' 'Afri Cola' or 'Ko Nut,' except what traveling salesmen have told me."

These products are offered to dealers as substitutes for Coca-Cola and are designed only to trade on Coca-Cola's reputation and advertising.

C. G. Peters, druggist in New Orleans for 28 years says (Rec., 656):

"You ask if I know what others call for. I will tell you, I had so darn many come around there that I ran them all out; they come and sell a thing as Coca-Cola and tell you you can use it as Coca-Cola, and expect you to substitute and use it as Coca-Cola. Every one of them does that, all that have been in my store—there has been 'Gay Ola,' and 'My Ola'—I don't know how many different kinds, about a dozen—all rivals of Coca-Cola, and not a one spent a dollar of advertising, and all trying to work on the advertising the Coca-Cola people are doing."

Pierre August Capdan, a pharmacist, for thirty years in New Orleans (Rec., 668):

"Well, occasionally, I see an advertisement—'Afri Cola,' and some other cola drinks, but not in the same way. These advertisements that I usually see don't impress me as being serious advertising, but simply sporadic—break out occasionally."

It is admitted that these products are imitations of Coca-Cola and are used to deceive.

J. E. Dunn, dispenser in employ of Nashville Drug Co., Nashville, Tenn., a witness called by the Koke Companies, testified as follows (Rec., 1159):

"We handled Coca-Cola exclusively. I regard these other cola drinks as imitations used principally as substitutes. At our present store we handle nothing but Coca-Cola and in response to calls for Koke and Dope or a shot in the arm, I serve him with Coca-Cola and understand that is what he means the biggest portion of my time. They use those names as nicknames for genuine Coca-Cola.

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These other cola drinks are cheaper and they make a little more money on it. Some do not run anything else in the fountain but that. Some places running up-to-date fountains, and a man calls for Coca-Cola he does not know what he is getting, except at this place up here, and it is very seldom they call for Coca-Cola straight, because practically everybody knew what we handled. If a man put it in his place, and serves it to everybody that comes in, no matter what they call for, it would be a substitute, but if a man puts it in and has Coca-Cola with it, and if a man calls for the substitute drink give it to him, but unless he calls for the genuine stuff give it to him.

* * * * *

If a person asked for a Dope and I gave him this so-called substitute, if he was a stranger to me and I did not have a personal knowledge that he wanted Coca-Cola, I would consider I was giving him what he wanted. You will find the biggest majority of dispensers that are serving too will do that.

* * * * *

They give themselves the benefit of the doubt, they don't care so long as they get the drink to him and make more money out of it."

J. C. Price, one of the Koke Companies' witnesses in the restaurant business in Nashville, testified (Rec., 1208):

"By competing drinks, I mean those drinks * * * sometimes spoken of as substitutes. Coca-Cola is the genuine * * * the product made in Atlanta."

(Rec., 1208):

"Those competing drinks cost the dealer less money than Coca-Cola, and there is more profit in it. When a man comes in and asks for a Koke or a Dope and if I have any of the competing drinks I give him the competing drink, but if I have not got the competing drink I give him the genuine, but if I have both I give the competing drink, because I can make more money on it."

(Rec., 1205.) In St. Louis:

"A. I had the Coca-Cola, the genuine Coca-Cola

and another cola. When customers came in and asked for a Koke or a Dope I sold the competing drink. If they asked for Coca-Cola I give them the genuine Coca-Cola. We served the competing drink because we felt like they did not want the genuine, if they did they would call for it by the full name."

* * * * *

(Rec., 1206):

"Customers asking for Coca-Cola were served the genuine Coca-Cola. I do not know whether or not any of our customers in calling for Koke and Dope knew they were getting a different brand of drink from Coca-Cola, but they all seemed satisfied. Very seldom I ever had a man turn it down and say it was not the genuine—I mean a man come in and call for Dope and it was very seldom I had a man go away dissatisfied."

The foregoing is typical.

These substitutes are handled by the dealers because they can be sold to the consumer as Coca-Cola, a greater profit realized, and the consumer cannot tell the difference. Those dealers, who for fear of getting caught, hesitate to sell these substitutes when Coca-Cola is called for by the name Coca-Cola, do so when the consumer uses a Coca-Cola nickname in making his wants known, and the substituting dealer then justifies himself that he is not passing off because the customer has not asked for Coca-Cola by the name Coca-Cola, but has used some slang phrase, abbreviation or nickname which he understands to mean Coca-Cola, and which the dealer also so understands. The common nicknames used are Koke and Dope, which to the public mean Coca-Cola, and which the dealer knows, but the cheaper and more profitable and indistinguishable substitute is passed off because the substituting dealer is able to excuse himself by saying that the customer has not asked for Coca-Cola, and if he wanted Coca-Cola he would say Coca-Cola. This is very clearly shown from the testimony and it may safely be

said that all of the witnesses produced by the Koke Companies in an attempt to prove that the words Koke and Dope are common names for a class of drinks, can be grouped under this head. They are people who are attempting to justify their own fraud.

The testimony of Embrey (Rec., 1018) taken at Chattanooga, and quoted at length in Schedule VI, is entirely characteristic. First he handled only Coca-Cola. He recognized, as did his customers, that the name was abbreviated into Koke and that it was nicknamed Dope. This situation had existed for years. Then an imitation was offered at a lower price. This at first perhaps was not passed off on people who used the name Coca-Cola when making known their wants. The genuine was usually kept on hand to supply such. But when people used the familiar nicknames Koke and Dope the imitation was sold without comment and the customer did not know the difference. The failure of the purchaser to use the name Coca-Cola was the excuse of the dealer to sell the cheap imitation. The next step was inevitable, the imitation having demonstrated its ability to escape detection when sold to people who asked for Koke or Dope, and meant Coca-Cola, was soon sold to people who used the name Coca-Cola. As E. A. Sharp (Rec., 1260), one of the Koke Companies' witnesses admitted, "I do not know that I can say I never had served any other drink beside Coca-Cola when Coca-Cola was called for, because you are liable to get them mixed up in a soda fountain. They are so much alike I think anybody is liable to get them mixed up."

The inside of the whole contention that Koke and Dope mean any drink similar to Coca-Cola is exposed by the Koke Companies' witness F. H. Willis, soda dispenser, in the employ of Ha Ha Store, No. 3 Arcade, Nashville, Tenn., as follows (Rec., 1192):

"Fletchers Cola was given when people asked for

Dope or Koke. We did that because we made more money on it.”

* * * *

This witness handles Candy Cola made by Matthews in Nashville.

“Some of our customers know we are handling Candy Cola. I do not know whether the general public knows of Candy Cola or not. I never saw any advertising of Candy Cola. I do not know whether people who come into our store and ask for Koke or Dope expect to get Candy Cola or not, but they expect to get some kind of a cola that we serve there. I do not know what they expect to get. I give them Candy Cola.

I never sell Coca-Cola when Koke or Dope is asked for. I have instructions to sell Candy Cola when Koke or Dope is called for.

* * * *

We do not sell Candy Cola when Coca-Cola is asked for. * * * I might have served Candy Cola in response to calls for Coca-Cola.”

This witness was asked concerning the pumps of his soda fountain (Rec., 1194):

“No. 5 is labeled Coca-Cola, and we keep Candy Cola in the Coca-Cola jar.”

J. M. Smith, another of the Koke Companies' witnesses who handles Matthews product, said (Rec., 1185):

“There is a difference in profit in favor of Matthews' syrup, it costs less than Coca-Cola. I have Coca-Cola advertisements and signs ‘Drink Coca-Cola,’ * * * I have not any signs of Matthews' drink. * * * I have not been out of this Matthews mixture for sixty days. Mistakes are liable to happen.”

The testimony in support of the contention that Koke and Dope are generic terms and apply to all drinks like Coca-Cola proves too much. The witnesses testify that these names apply to all drinks of this kind, *except Coca-Cola*—that they do not apply to Coca-Cola because Coca-Cola costs too much.

G. G. DeSouchet, one of the Koke Companies' witnesses—in the saloon business in Birmingham, testified (Rec., 1350):

“Customers frequently came in and asked for Dope. I gave them something besides Coca-Cola, some of the other Cola drinks. I done that for the reason of the price, that is all. Not on account of the goods, that is Coca-Cola costs 70 cents up there and the other costs 50.”

If the names Dope and Koke apply to a class of drinks, undeniably Coca-Cola is in that class—the words should apply to it as well as the others—and here lies the answer—the public pays five cents a glass for all of them—and cannot tell the difference. The Coca-Cola nicknames are definite enough with the public—they mean Coca-Cola—it is only with the swindling dealer that there is any doubt about it—a doubt to excuse a fraud and for revenue only.

The proof adduced by the Koke Companies that other manufacturers of soft drinks have imitated Coca-Cola in color, taste and appearance, bottles, barrels and dress, does not sustain the contention that these elements are common to the trade. On the contrary, it goes to show that others have been guilty of acts of fraud similar to those charged against the unfair traders here before the court and is an aggravation rather than a defense.

In *Singer Company v. June*, 163 U. S., 169, the complainant was in the habit of numbering its sewing machines serially, and, since it was a large manufacturer and had been in business many years, these numbers ran into the millions. Defendant, a small manufacturer recently established, began number in the millions. It was contended that this was a trade custom.

Mr. Justice White said (202):

“But there are other circumstances in the record which throw light upon the facts which we have just

stated, and lend to them an increased significance. On the plate of the Singer machines there was plainly marked a number, which the proof shows had run with relatively accurate consecutiveness from the beginning. These numbers, as a result of the vast development of the business of the Singer Company and the enormous number of New Family machines sold by them, ran into the millions. The defendant, who was in the commencement of his business, at once began also to number his machines in the millions, thereby conveying the obvious impression that they were the result of a manufacture long established, and as they were marked 'Singer' suggesting by an irresistible implication, that they were machines made by the Singer Company. There is an attempt in the evidence to explain this fact by the statement that it was the habit of sewing machine makers to add three figures to the actual number of machines by them made, but the proof does not sustain the explanation, and if it did, it amounts to but the contention that the commission of a fraud should be condoned because others were guilty of similar attempts to deceive."

See also:

Ultramarine Fabriken v. Amberg, 109 Fed., 151.

Gillott v. Esterbrook, 47 Barb., 455; R. Cox, 340; 48 N. Y., 374.

Cook v. Ross, 73 Fed., 203.

Celluloid Co. v. Cellonite Co., 32 Fed., 94, 101.

Taylor v. Carpenter, 3 Story, 458; R. Cox, 14, 19.

Sheppard v. Stuart, 13 Phila., 117; P. & S., 193, 202.

Liebig's Extract Co. v. Chemists Co-Op. Soc., 13 R. P. C., 635.

The court below entered a proper decree.

The court below has found that the Koke Companies have been guilty of unfair trade in the superlative degree. That, as a matter of fact from the evidence they were organized for the purpose of manufacturing and

selling a syrup in imitation of Coca-Cola, aided the persons to whom the product was sold in its substitution for Coca-Cola; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by The Coca-Cola Company; that the word "Koke" is a nickname for Coca-Cola, and was adopted with the deliberate purpose of representing the Koke Companies' goods to be the manufacture of the Coca-Cola Company; that the Koke Companies imitated the Coca-Cola label and copied and imitated the barrels in which Coca-Cola is shipped; that the word "Dope" is a nickname for Coca-Cola and was adopted and used by the Koke Companies to take advantage of this fact; that the Koke Companies' salesmen were instructed to and did sell the Koke Companies' product as and for Coca-Cola; and in finding that Mayfield did not adopt the word Koke until 1909, the court evidently disbelieved his statement of use prior to that time, and by the strongest possible inference has convicted Mayfield of wilful perjury because there is no possibility that he could honestly be mistaken in his assertions of such prior use.

The authorities all agree that a plaintiff, having established unfair trade, is entitled to practical relief; that the restraint should be commensurate with the wrong, and that the court should strive to see, not how much of the trade gained by fraudulent methods it can preserve to a defendant, but how effectually it can stop the piratical practices.

Oneida Community, Ltd., v. Oneida Game Trap Co., Inc., 154 N. Y. S., 391, Woodward, J., said:

"The plaintiff is entitled to a practical injunction. * * * It is not the province of a court of equity to aid wrongdoers. It fulfills its mission when it has restrained the commission of a wrong, leaving the wrongdoer to figure out for himself how

far he can disregard the mandate of the court and the requirements of a clean conscience.”

Guth Chocolate Co. v. Guth, 215 Fed., 750, Rose, J. (766):

“Where he has greatly offended, he may be strictly restrained.”

Williams v. Johnson, 2 Bosw., 1; *R. Cox*, 214, Woodruff, J.:

“It is so palpable as to admit of no reasonable doubt that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired. He is in this respect entitled to no favor. The court, in considering the propriety of enjoining him pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases.”

In *Valentine v. Valentine*, 17 R. P. C., 673, 686, Lord Justice Rigby said:

“That being the main ground on which they have proceeded in this case, I do not see how they can really seriously object, having been guilty of unfair trading—and to my mind utterly unfair trading—they cannot very well say, ‘oh, here and there you have been rather hard upon us.’ I want to see how that unfair trading can be put an end to—not how much of it we can preserve.”

In *Anheuser-Busch v. Piza*, 24 Fed., 149, Judge Wallace said:

“It is not unreasonable, in view of the defendant’s purpose to deceive the public by adopting this label, to resolve any doubt which may remain in favor of the complainant.”

In *Franck v. Frank*, 95 Fed., 818, Judge Seaman said (820):

“The defendants must be allowed no advantage out of the trade thus obtained wrongfully but must establish the reputation of their goods upon merit,

and without benefit of the imitation. Decree for the complainants may be prepared accordingly.”

In *Hires v. Consumers Co.*, 100 Fed., 809, Judge Jenkins said (813):

“This is especially so here, where the infringement was deliberate and designed. In such case the court ought not to say how near the infringer may lawfully approximate the label of the complainant, but should cast the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice and whether it be not better for him to keep as far from it as possible.”

The language of the Circuit Court of Appeals of the Sixth Circuit, where the imitation of the color of Coca-Cola was enjoined, is pertinent here.

In *Coca-Cola v. Gay-Ola Co.*, 200 Fed., 720, Judge Denison said:

“We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that, if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and that, so far as defendant cannot safeguard this result, it may not use the color. * * * The defendant should be enjoined from selling Gay-Ola of a color the same as or substantially similar to Coca-Cola, unless and in so far as upon settlement of the decree below means may be provided by which the ultimate consumer will be fairly advised that he is not getting complainant’s Coca-Cola, but is getting something else.”

See also 211 Fed., 942, on settlement of the decree, and *Hiram Walker v. Grubman*, 222 Fed., 478.

The nature of the relief granted in unfair trade cases is flexible and depends upon the facts upon which it is based. As courts have always refrained from defining unfair trade but have regarded as actionable any con-

duct which has a tendency to promote the sale of the goods of one trader as and for those of another, so in measuring the relief, it is made to conform to the practical trade situation disclosed, and depends upon the facts of each case, the nature of the trade, the manner of the injury and the flagrancy of the offense. There is no set form of injunction, but the courts measure the relief to suit the circumstances. The following authorities indicate the adaptability of courts of equity in such matters:

The Lord Chancellor said, in *Reddaway v. Banham*, 13 R. P. C., 218, 225:

“What in each case, or in each trade, will produce the effect intended to be prohibited, is a matter which must depend upon the circumstances of each case, and the peculiarities of each trade. It would be very rash *a priori* to say how far a thing might or might not be described without being familiar with the technology of the trade.”

As was said by Mr. Justice Stirling, in *Powell v. Birmingham Vinegar Brewery Co.*, 12 R. P. C., 496, 515:

“Now, although it has several times been laid down that it is the duty of the person who thus introduces articles of his manufacture into the market under the same name as that employed by another manufacturer, to distinguish the goods so newly introduced from those previously in the market, no court has ever said how the distinction is to be made, and, in my judgment, this is not a matter which can be reduced to any simple rule, but must depend on the circumstances of each particular case. It may very well be that what is sufficient in the case of a wine producer, may not be enough in the case of a brewer, and that that which is perfectly adequate in the case of a brewer, may prove to be quite inadequate in the case of a maker of pickles and sauces. The one point to be considered in each case appears to me to be whether the natural and probable result of the defendants’ acts will be to mislead purchasers, and so deprive the plaintiff of business intended for him.”

On appeal the matter was discussed at considerable length. Lord Justice Lindley said, 13 R. P. C., 253; (1894) 3 Ch., 449; (1894) 3 Ch., 462; (1896) 2 Ch., 64; (1897) A. C., 710:

“If it be impossible, profitably, to use the old name, and at the same time so to distinguish the two classes of goods as to prevent the rival goods from being mistaken for others, what is to be done? Is the name to be protected and rivalry prevented, or is the rival to be at liberty to use the name and destroy the trade of the old trader? Both principle and authority clearly appear to be in favor of the old trader, if he can prove that the name denotes his goods, and that his rival’s are, in fact, mistaken for his.

I do not shrink from the conclusion that the defendants may find it practically impossible profitably to compete with the plaintiffs in their trade. I do not see the injustice of such a conclusion, nor do I see that the public will greatly, if at all, suffer by it.”

Lord Justice Smith said, 13 R. P. C., 263:

“It may be that the result of such a state of things is that it gives to the plaintiff a practical monopoly in the words which otherwise he would not have, and it appears to me, so far as the evidence as to this in the present case goes, that this is so. Whether it is possible to mask the words ‘Yorkshire Relish’ so that they will become innocuous, such as by selling ‘Yorkshire Relish’ in jars, or tins, or barrels. I do not know, but it would seem that, if this be possible, and it be done so that the words do not mislead, then the object which I have no doubt the defendants have in using the words will be thereby frustrated.”

An illustration of the application of this rule is found in *Thompson v. Montgomery* (1891) A. C., 217, 8 R. P. C., 361, 365, 368. In this case, plaintiff’s ales, from the fact that they were brewed in the Town of Stone, became known as “Stone Ales.” Defendant went to Stone and established a brewery and called the ale he brewed there “Stone Ale.” He was held to be an unfair trader, but on the settlement of the decree contended that he had a

right to establish his brewery at the Town of Stone and should be permitted to use the name of that town.

Lord Herschell said (8 R. P. C., 365):

“It appears to me idle to argue in opposition to the injunction that it is against the public interest to permit a monopoly of the use of the name of a town for trade purposes, when the only effect of allowing its use by the person, and for the purpose sought to be restrained, would be to deceive the public.”

This case has been repeatedly cited with approval by the Supreme Court. See:

Lawrence Manfg. Co. v. Tenn. Manfg. Co., 138 U. S., 550.

Coates v. Merrick Thread Co., 149 U. S., 562, 566.

See also:

Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co., 105 Minn., 315; 117 N. W., 447.

Gustavino v. Comerma, 184 Fed., 549, 550.

Portuondo v. Portuondo, 222 Pa., 116; 70 At., 968, 973, 975, 976.

Van Stan v. Van Stan, 209 Pa., 564; 58 At., 1064, 1066.

Cohen v. Nagle, 190 Mass., 4; 76 N. E., 276, 278, 282.

The injunction directed by the court below is no broader than is necessary to protect The Coca-Cola Company from the acts of unfair trading of which the Koke Companies are guilty. It enjoins in terms the efficient means of fraud and deception which the Koke Companies have used, as the result of which their goods have been sold as and for Coca-Cola and the elements which promote and contribute to this fraud. For the protection both of The Coca-Cola Company and the public, such restraint is necessary. If the findings of fact on which the decree is

based are concurred in, the injunction in the terms granted follows as a necessary conclusion.

There can be no criticism of the court's decree, unless it be that it effectually stops fraud. It in no way hampers the Koke Companies in the sale of an honest product, decently and on its merits.

Conclusion.

We believe that under the evidence in this case and under the authorities cited, the use of the Coca-Cola nicknames Koke and Dope by the Koke Companies produces confusion of goods, deception of the public and damage to The Coca-Cola Company, and that restraint against their use was proper; that the imitation of Coca-Cola in taste and appearance and the imitation of labels and barrels are important elements in the Koke Companies' fraudulent scheme and aid the deception and damage initiated by their use of the Coca-Cola nicknames and are efficient helps in their course of unfair trading; that the defense interposed here of prior use of the word Koke based as it is on Mayfield's testimony, is fabricated; that the claims of Mayfield to know the Coca-Cola formula or to have any rights in it or in the Coca-Cola business and ever to have used the name Koke before 1909 are pure inventions; that the defense interposed in so far as it relates to the alleged common trade meaning of the words Koke and Dope is wholly disingenuous; that the pretended purchase of the registrations of Koke and Dope from Bitting and Murfreesboro Bottling Works was an attempt to give a legitimate appearance to the Koke Companies' fraud and to clothe it with an apparent legal sanction, and thus to pirate under the forms of law; that the decision of the court below, concurred in by Judge Foster and the Patent Office, was

correct, and that no other conclusions than those arrived at by Judge Sawtelle are possible under the evidence before him and now before this court, and that his decree should be affirmed.

Respectfully submitted,

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Company, Appellee.*

WILLIAM K. WHITE,

Solicitor for Appellee.

APPENDIX I.

235 FED., 408.

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Arizona.

The Coca-Cola Company,
*Plaintiff,**vs.*The Koke Company of America,
The Southern Koke Company, Ltd.,
The Koke Company of Texas,
The Koke Company of Arkansas,
The Koke Company of Oklahoma,*Defendants.*In Equity.
(Phoenix)

Harold Hirsch, of Atlanta, Georgia; Edward S. Rogers, of Chicago, Illinois, and Joseph E. Morrison, of Phoenix, Arizona, Solicitors for Complainant; Frank F. Reed, Candler, Thomson & Hirsch of Counsel.

Richard E. Sloan, of Phoenix, Arizona; James W. Westervelt, of Phoenix, Arizona, and Augustine B. Littleton, of Chattanooga, Tennessee; Littleton, Littleton & Littleton, Chattanooga, Tennessee, for Defendants.

SAWTELLE, District Judge:

The bill in this case seeks relief by injunction, both preliminary and perpetual, against the defendants because of their joint and several infringement of the plaintiff's trademark—"Coca-Cola"—and for unfair competition on their part. It also asks an accounting of the profits received by defendants, and the assessment of damages sustained by plaintiff.

The material allegations of the bill, so far as they are necessary to be set forth for the determination of the issues made, are as follows:

The first section of the bill recites the initial manufacture of

the syrup known as "Coca-Cola" by J. S. Pemberton in the year 1886, and traces the title through its various transfers into the plaintiff company on February 22, 1892.

It is alleged that the process and formula for the manufacture of the beverage and syrup styled "Coca-Cola" was new and original and was invented and discovered by plaintiff and its predecessors as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than the plaintiff and its officers and employes and predecessors of plaintiff.

The second section of the bill charges the continued manufacture of syrup made under the Pemberton formula; alleges that the trade-mark "Coca-Cola" was, at the time of its adoption by the predecessors of plaintiff, characteristic and distinctive and had never before been used by anyone, and has continuously been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar product of others, and that said trade-mark does now identify and distinguish plaintiff's product. It is further charged that plaintiff's product has been given by the purchasers and consumers thereof certain nicknames, to wit:

"Koke" and "Dope," and that each of these words are now and for many years past and prior to the application of either of them to any other beverage recognized and commonly and familiarly used as nicknames for Coca-Cola, and that a request for either is understood, both by the seller and the purchaser, to be a specific and definite request for Coca-Cola and has been so understood and regarded, and acted on both by the seller and purchaser, for many years prior to the manufacture or sale of any other preparation under either of said names; and that at the present time both dispensers and consumers use these words as descriptive of the product of plaintiff, and for no other beverage.

The third section of the bill alleges the application to the patent office for the registration of the words "Coca-Cola"

as a trade-mark on May 14, 1892, and the allowance of said application on January 31, 1893, and the issuance of a certificate of registration on that day, which is alleged to be in full force and wholly unrevoked and unanceled.

It is also alleged that on April 23, 1905, under and by virtue of the Act of Congress of February 20, 1905, the plaintiff duly applied to the Patent Office of the United States for the registration of the said trade-mark "Coca-Cola," and complied in all respects with said Act and the Regulations of the Commissioner of Patents, and thereupon the registration of said trade-mark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages and a certificate of registration, No. 47189, was duly granted to the plaintiff on October 31, 1905, and is still in full force and effect, and that plaintiff is entitled to the sale and exclusive right, both generally and in interstate commerce, to use and employ said trade-mark on its goods.

The fourth section of the bill alleges the sale of both the syrup and of an areated beverage, permitted to be manufactured from the syrup by certain licenses of plaintiff, under the trade name, in distinctive receptacles, bottles and barrels and labels, all of which were adopted by plaintiff for the purpose of distinguishing the product of plaintiff from that of other manufacturers in the same lines.

The fifth paragraph sets up that the plaintiff has expended much time, labor and money in advertising its product. It is alleged that the Koke Company of America was organized under the laws of the State of Arizona about September 15, 1911, and thereafter proceeded in the city of St. Louis to manufacture an unnecessary and deliberate imitation of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and placed the same in barrels and packages similar to those of the plaintiff. That said extract is designated by the defendants sometimes as "Koke", and sometimes as "Dope"; that the Koke Company of America

ships said imitative extract from the city of St. Louis, usually under the name of "Koke", to the other defendants, and that said extract is used by said defendants as a basis for making a syrup for sale to soda fountains and in bottles which resemble the articles produced by plaintiff, and that the defendants, as a matter of fact, do sell, substitute, and palm off the said syrup and extract as and for the Coca-Cola products of plaintiff. It is alleged that the said imitation product is, with the consent of defendants, sold to the public in substitution for genuine Coca-Cola. It is further charged that the defendants adopted the words "Koke" and "Dope" as a name for their product many years after the words were commonly used to describe the plaintiff's product, and that said adoption was a means to enable them to substitute their product for that of the plaintiff and to reap the benefit of its advertising and labor in dispensing and selling said product. It is also alleged that the defendants stated, both to bottlers and dispensers, that the syrup they made was produced under the same formula as Coca-Cola, and instructed both dispensers and bottlers to substitute their product when the purchaser desired and intended to obtain Coca-Cola.

It is further alleged that the registration in the patent office of the words "Koke" and "Dope" claimed by defendants was in fraud of the rights of plaintiff, and that the defendants threaten to sue dealers and dispensers who deliver Coca-Cola when "Koke" and "Dope" are called for and when both the dispenser and purchaser design to sell and receive Coca-Cola.

The answer denies all the material allegations of the bill, and after setting up the manner of acquiring title to the trade names "Koke" and "Dope", denies that, at the time they were adopted by their predecessors, they were generally used as a synonym or nickname of plaintiff's product.

The answer then alleges that the plaintiff has been and is now engaged in establishing a monopoly, and that the busi-

ness of defendants and their patrons is being subjected to a system of espionage by plaintiff and its officers and agents, and agents are using the information thus acquired to impede and harass the customers of defendants, representing that the business of defendants is fraudulent and dishonest and its product inferior imitations of Coca-Cola, and threatening prosecutions if defendants' products are dealt in by its customers.

The answer then alleges that by reason of these representations and threats many of its customers have ceased to deal in its products to its damage. It is also contended in the answer that the name "Coca-Cola" was deceptive as a trademark and for that reason was fraudulent, and was but a descriptive name for a product which the plaintiff does not now produce.

Numerous authorities have been cited by both sides, with variant facts, but as each case must be determined on all facts that surround it the facts in any prior case cannot be a guide to the decision of the subsequent. This view is cogently pointed out on page three of lectures of John Cutler, of King's College, entitled "Passing Off".

The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated: "No man has a right to pass off his goods as though they were the goods of another."

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another."

Canal Company v. Clark, 13 Wall., 311.

The difficulties which arise are in the application of this principle to the facts of the particular case, and the question which the court has to decide is always a question of fact. The decision of the court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be

considered in arriving at a conclusion. I quote from a few of the leading cases both English and American.

In the case of *Burgess v. Burgess*, 3 Deg. M. & G., 896, Lord Chief Justice Turner, said:

“No man can have any right to represent his goods as the goods of another person, but in application of this kind it must be made out that the defendant is selling his own goods as the goods of another.”

In the case of *Reddaway v. Banham*, A. C., 199; 13 R. P. C., 224, the Lord Chancellor said:

“My lords, I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your lordships have been engaged, that it is sometimes difficult when examining former decisions to disentangle what is decided as fact, and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else.

How far the use of particular words, signs or pictures does or does not come up to the proposition which I have enunciated in each particular case, must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof, but if the proof establishes the fact the legal consequence appears to follow.”

In a later case in the House of Lords, referring to *Burgess v. Burgess*, the Lord Chancellor made this statement:

“The proposition of law is one which, I think, has been accepted by the highest judicial authority, and acted upon for a great number of years. It is that of Lord Justice Turner, who says, in terms: ‘No man can have any right to represent his goods as the goods of another person. In the application of this kind, it must be made out that the defendant is selling his own goods as the goods of another.’ That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Lord Jus-

tice Turner is if he were to say in terms, 'These are the goods manufactured by' a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter the same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words, but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public. In each case it comes to be a question of whether or not there is the statement made; and if the statement is made, there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have heard from Lord Justice Turner."

Powell v. Birmingham Vinegar Co., A. C., 710; 14 R. P. C., 727.

"In all cases where rights to the exclusive right of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities."

Canal Co. v. Clark, 13 Wall., 311, 322.

"Equity gives relief in such a case, upon the grounds that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose

reputation is not so high as manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy. *Seiro v. Provezende*, Law Rep., 1 Ch., 195."

McLean v. Fleming, 96 U. S., 245, 251.

"The first appropriator of a name or device pointing to his ownership or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must therefore be distinctive in its original signification, pointing to the origin of the articles, or it must have become such by association."

Lawrence Mfg. Co. v. Tenn Mfg. Co., 138 U. S., 537, 546.

"Every one has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such

a fraud by the use of description or geographical terms which are not susceptible of monopolization as trade-marks as effectually as it prohibits its commission by the use of any other expressions."

Shaver v. Heller & Merz Co., 108 Fed., 821, 827.

"No person other than the owner of a trade-mark has a right, without the consent of such owner, to use the same on like articles, because by so doing he would in substance falsely represent to the public that his goods were of the manufacture or selection of the owner of the trade-mark, and thereby would or might deprive the latter of the profit he otherwise might make by the sale of the goods which the purchaser intended to buy. Where a trade-mark is infringed the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trade-marks. It is not necessary that a trade-mark should on its face show the origin, manufacture or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade, it has acquired with the public an understood reference to such origin, etc. This doctrine has repeatedly been declared by the Supreme Court, *Canal Co. v. Clark*, 13 Wall, 311, 323; *Manufacturing Co. v. Trainer*, 101 U. S., 51, 54; *Medicine Co. v. Wood*, 108 U. S., 218, 223; 2 Sup. Ct., 436; *Menendez v. Holt*, 128 U. S., 514, 9 Sup. Ct., 143; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S., 598, 603, 9 Sup. St., 166; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, 546; 11 Sup. Ct., 396; *Mill Co. v. Alcorn*, 150 U. S., 460, 462; 14 Sup. Ct., 151."

Dennison v. Thomas, 94 Fed., 651, 656.

I think it has been established by the evidence in this case that the plaintiff is the owner of and alone entitled to use the trade-mark "Coca-Cola" and that its goods alone can lawfully be sold under that name.

It is insisted by the defendants that the words "Coca-Cola" are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trade-mark. The contention was consid-

ered in the case of *Coca-Cola Company v. Nashville Syrup Co.*, 215 Fed., 527, and was there decided adversely to such contention. I think that decision is decisive of the question.

The question of the validity of the trade-mark "Coca-Cola" and the right of plaintiff to its exclusive use since its registration under the Act of Congress of February 20, 1905, would seem to be placed beyond the pale of contention by the case of *Coca-Cola Company v. Deacon Brown Bottling Company*, 200 Fed., 105.

I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendant, Koke Company of America and its predecessors, did not adopt or make use of the name "Koke" until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff.

Parker v. Stebler, 177 Fed., 210, 9th Circuit.

The Barbed Wire Patent, 143 U. S., 275.

Deering v. Winona Harvester Works, 155 U. S., 286.

I am convinced that when the witness Mayfield adopted the name "Koke," he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company. I further find that the purchase of the trade-mark "Koke" from the Murphreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the facts that the label of plaintiff was copied and imitated

and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness. The opinion of the Circuit Court of Appeals of the Sixth Circuit in *Coca-Cola Company v. Gay Ola Company*, in 200 Fed., on page 723, contains a forcible comment on the state of facts here shown to exist.

“It is first to be observed that defendant is at the best no a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the trade-mark names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or bad faith is the criterion, and their presence puts upon the user a burden of care to see that deception does not naturally result. Conversely when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying facts, and some which otherwise might be innocent become guilty. So here, the red color used by the complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly, but this color has long been used by complainant in a way that was exclusive in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant’s scheme of fraud. So, too, with defendants’ failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels, which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden.”

The witness Wright of the Southern Koke Company justified the use of the name "Koke", for he says that the name "Koke" was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word "Dope" was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

A decree is ordered for complainant. Counsel will prepare and tender a decree in accordance with this opinion.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
ARIZONA.

March Term, A. D. 1916.

The Coca-Cola Company,	} <i>Plaintiff,</i>
<i>vs.</i>	
The Koke Company of America,	
The Southern Koke Company, Ltd.,	
The Koke Company of Texas,	
The Koke Company of Oklahoma, and The Koke Company of Arkansas,	
<i>Defendants.</i>	}

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word "Coca-Cola" is a valid trade-mark.

(3) That plaintiff is the owner of and alone entitled to use the trade-mark "Coca-Cola" and that its goods alone can lawfully be sold under the name.

(4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola."

(5) That the defendant, the Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that they had and have no right to its use.

(6) That defendants and their predecessors have no interest in or claim to the trade-mark "Coca-Cola," the "Coca-Cola" business or formula, and the defendants and their predecessors' claim of interest in the "Coca-Cola" business,

the trade-mark "Coca-Cola" and knowledge of the "Coca-Cola" formula are without foundation.

(7) That the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' products under the names "Koke" and "Dope" as and for "Coca-Cola".

(9) That the defendants, and each of them, have infringed the plaintiff's trade-mark and have been guilty of unfair competition with the plaintiff.

(10) That defendants, the Koke Company of America, the Southern Koke Company, Ltd., the Koke Company of Texas, the Koke Company of Oklahoma, and the Koke Company of Arkansas, and each of them, their officers, servants, agents, employes, attorneys, licensees, transferees and assigns, and each and all thereof, and all acting by or under their authority be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola", or any like word, or the word "Koke" or any like word, or the word "Dope" or any like word; from claiming or asserting any right in the name "Koke" or in the name "Dope", or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product, not the plaintiff's, barrels or receptacles, colored in imitation of the plaintiff's said barrels or

receptacles; from stating or representing that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula, from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of the defendants and not of the plaintiff and further, from doing any act or thing, or using any name or names, devices, artifices or contrivances, which may be calculated to represent that any product not of the plaintiff's production is the genuine Coca-Cola of plaintiff, and that writs of perpetual injunction issue accordingly.

(11) That defendants and each of them be required to account to plaintiff for any and all profits derived by them, or any or either of them, and to pay to the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that this cause be referred to a Master in Chancery of this Court, to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent to the taking and stating of said account for profits and damages, and to report said account and statement of profits and damages aforesaid as by law provided.

(12) That defendants pay the costs of this suit to be taxed, and that upon taxation plaintiff have execution therefor.

WM. H. SAWTELLE,

Judge.

Dated September 16, 1916.

(7) That the words “Koke” and “Dope” were adopted and used by the defendants with the deliberate purpose of

representing their goods to be the product and manufacture of The Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' product under the names "Koke" and "Dope" as and for Coca-Cola.

(9) That the defendant, James L. Wright, was not connected with the Southern Koke Company herein referred to in the bill of complaint at the time of the filing of bill of complaint; therefore, injunction is not granted against him.

(10) That the defendants, except as above, and each of them, have infringed the plaintiff's trade-mark and have been guilty of unfair competition with the plaintiff.

(11) That defendants, The Southern Koke Company, Crescent City Seltz & Mineral Water Company, and each of them, their officers, servants, agents, employes, attorneys, licensees, transferees and assigns, and each and all thereof, and all acting by or under their authority and J. C. Mayfield, his heirs, assigns and all persons claiming under or through him be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola" or any like word, or the word "Koke" or any like word, or the word "Dope", or any like word; from claiming or asserting any right in the name "Koke" or in the name "Dope", or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product, Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product not the plaintiff's, barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or repre-

senting that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup, or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula; from claiming any interest in or having had an interest in the Coca-Cola business, from claiming any knowledge of the Coca-Cola formula; from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of defendants and not of the plaintiff, and further, from doing any act or thing, or using any name or names, devices, artifices or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine Coca-Cola of plaintiff, and that writs of perpetual injunction issue accordingly.

12) That defendants, and each of them, may be required to account to plaintiff for any and all profits derived by them, or any or either of them, and to pay the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that in the event that the parties do not agree as to the amount this cause be referred to a Master in Chancery of this Court, to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent to the taking and stating of said account for profits and damages and to report said account and statement of profits and damages aforesaid as by law provided.

(13) That defendants pay the costs of this suit to be taxed and that upon taxation plaintiff have execution therefor.

May 24, 1917.

(Signed) RUFUS E. FOSTER,
Judge.

APPENDIX IV.

DECISION OF THE EXAMINER OF INTERFERENCES.

Final Hearing,
December 6, 1915.

JHD.

IN THE UNITED STATES PATENT OFFICE.

Composition No. 1424.

The Coca-Cola Company *vs.* Koke Company of America.

Application No. 71308, filed June 23, 1913, published December 9, 1913.

Refreshing Non-Alcoholic Beverage not in the nature of a food and a soda fountain syrup.

Messrs. Harold Hirsch, Frank F. Reed, Edward S. Rogers, F. L. Brown and Francis M. Phelps for the Coca-Cola Company.

Messrs. F. T. F. Johnson and Joseph W. Bailey for the Koke Company of America. Augustine B. Littleton on brief.

The applicant is seeking to register the word "Koke" as a trade-mark for "a refreshing non-alcoholic beverage not in the nature of a food and a soda-fountain syrup" (applicant's statement).

The opposition, as originally filed, was based upon the ground, briefly stated, that "Koke" is a

"Deceptive imitation in sound, appearance and suggestion of opposer's said trade-mark name, "Coca-Cola."

The ground of opposition now chiefly relied upon by the opposer (Opposer's brief, page 1) is

“that the mark of the applicant is deceptive and should not be registered because Koke is a common abbreviation of opposer's trade-mark Coca-Cola and a familiar nickname for opposer's product.”

The ground of opposition, in the form now relied upon by the opposer, was substituted, for that originally alleged, by an amendment to the notice of opposition, filed more than thirty days after the publication of the mark sought to be registered (Amendment filed August 3, 1914, and modified during the proceedings before the Commissioner on appeal).

It is urged, in behalf of the applicant (Applicant's Brief, page 108), that the amended notice of opposition sets up a new cause of action which was not pleaded in the notice of opposition as originally filed. This point was duly raised by the applicant when the motion to amend the notice of opposition was presented by the opposer and was decided in applicant's favor by this tribunal (Decision of August 21, 1914). On appeal, the decision of this tribunal was reversed by the First Assistant Commissioner, and the amendment, in a slightly modified form, was entered as a basis for further proceeding (Decision of September 5, 1914). The decision of the First Assistant Commissioner to the effect that the amended notice of opposition does not set up a new cause of action is controlling in its effect upon this tribunal. Further consideration of the merits of that question as a basis for the decision now to be rendered in this case would, therefore, be unwarranted.

The applicant contends that the amended notice of opposition does not state a valid cause of action (Applicant's Brief, p. 8.) It is urged that the only valid grounds for refusing registration are those defined in Section 5, of the trade-mark act of February 20, 1905 (as amended), and that the alleged use by the general public of the word “Koke” as an abbreviation of or nickname for “Coca-Cola” does not correspond

with any of the grounds named therein, but, at the most, amounts to nothing more than an allegation of unfair competition. This point was raised by the applicant in support of its motion to dismiss the opposition, filed September 18, 1914. In deciding that motion (Decision of October 3, 1914) it was ruled by this tribunal, without passing upon the merits of the specific question thus presented, that the amendments which had been made to the notice of opposition, were not such as to materially change the nature of the proceeding which, as originally filed, was based upon a satisfactory allegation of similarity between the words "Koke" and "Coca-Cola." The First Assistant Commissioner (Decision of January 13, 1915) affirmed the decision denying the motion to dismiss but based his action upon entirely different grounds. He overruled applicant's contention that an opposition should be dismissed unless the grounds set up as a bar to registration are found in Section 5 of the trade-mark act, and held that other grounds of damage may be relied upon as a basis for opposition under the broad provisions in Section 6. The question of opposer's right to rely upon the original allegation of similarity between "Koke" and "Coca-Cola" was not mentioned.

That an opposition may be sustained and registration refused on grounds other than those specifically defined in Section 5 of the trade-mark act has recently been decided by the First Assistant Commissioner in his decision in Opposition No. 1641, *Western Clock Co. v. Sears Roebuck and Co.* (117 MS. D., 465). In that case the opposer alleged that it had manufactured and sold clocks under the trade-mark "Big Ben," but that it had also advertised such clocks under the trade-name "National Call" which had become generally known to the public as an identifying name for opposer's goods. It was held by the acting examiner of interferences that the facts alleged in the notice of opposition, if established, would not constitute a statutory bar to the registration of the

name "National Call" to one who had used it as a trade-mark, because the ground of opposition relied upon by the opposer did not correspond with any of the reasons for refusing registration defined in Section 5 of the trade-mark act, and that no other grounds for refusing registration should be recognized by the patent office. The decision of the acting examiner of interferences in that case was reversed by the above cited decision of the First Assistant Commissioner, in which it was said:

"This case (*Western Clock Co. v. Sears Roebuck and Co., supra*) seems to be practically on all fours with that of *The Coca-Cola Co. v. Koke Company of America*, decided by me January 13, 1915."

Both of the above mentioned decisions of the First Assistant Commissioner are printed in full in Opposer's Brief (pp. 215 to 220).

In view of the above cited decisions of the First Assistant Commissioner, one rendered in this case, and the other in the case of *Western Clock Co. v. Sears, Roebuck & Co.*, a ruling by this tribunal to the effect that the amended notice of opposition does not state a valid ground of opposition, as contended by applicant, would be unwarranted. Applicant's alleged right to registration and opposer's alleged damage must therefore be determined from the evidence which has been introduced in support of the facts pleaded in the notice of opposition and applicant's answer thereto.

That the beverage for which applicant is seeking to register "Koke" as a trade-mark and the product which the opposer sells under the name "Coca-Cola" are merchandise of the same descriptive properties, as that term is used in trade-mark law, is not controverted. The decision to be rendered in this case is therefore dependent solely upon the alleged conflicting use of the marks "Coca-Cola" and "Koke" in connection with the manufacture and sale of such goods.

It is satisfactorily established by evidence introduced by both parties to this proceeding that "Coca-Cola" was made

and sold in small quantities by one J. S. Pemberton, of Atlanta, Georgia, at least as early as the year 1887. The Coca-Cola Company in its notice of opposition, alleged title through mesne assignments from said Pemberton. The applicant, in its answer, alleged that its predecessors in business, acquired some interest in Coca-Cola from the same J. S. Pemberton, and evidence has been introduced in support of such claim. According to this testimony J. S. Pemberton was doing business in 1887 under the name "Pemberton Chemical Company" and, as a part of that business, was making and selling Coca-Cola. In 1888 he entered into partnership with J. C. Mayfield, F. H. Bloodworth, and A. A. Murphy, after which the business was continued under the name "Pemberton Medicine Company." The applicant claims that the Coca-Cola business was understood to be a part of the consideration advanced by Pemberton when the partnership was formed. This claim, in behalf of the applicant, to the effect that a predecessor of the Koke Company of America, acquired some interest in the Coca-Cola business, as a result of a transaction which occurred in 1888, is held to be of no importance in view of testimony relative to subsequent events introduced and relied upon by the applicant. The substance of that testimony is to the effect that a controversy arose between Pemberton and the other members of the Pemberton Medicine Company soon after the partnership was formed at which time Pemberton announced that he had agreed to let his son have the Coca-Cola business (Applicant's Rec., pp. 391 and 777), and that, although the other partners did not consent to the surrender of Coca-Cola, they nevertheless agreed to adopt a different name for the product which had previously been sold as such (Applicant's Rec., pp. 391 and 778). That was in 1888 and there is no evidence of record that the applicant or any of its alleged predecessors afterwards used or attempted to use the name "Coca-Cola." If applicant's predecessors ever had any interest in the mark "Coca-Cola," as to which no opinion

need be expressed, it is held that they abandoned the same by intentionally and deliberately discontinuing its use in 1888 and by failing to resume such use during the following twenty-seven years (J. C. Mayfield, Sr., XQs. 1224, 1225). Moreover, the opposer has introduced testimony and documentary evidence relied upon to perfect a continuous chain of title to and continuous use of "Coca-Cola" from 1887 to the present time. That evidence has been abstracted and tabulated on pages 119 to 315 of opposer's brief. That it is sufficient for the purpose, if opposer's title to "Coca-Cola" is at all material to this case, appears to be conceded, and will be so regarded, since applicant has not questioned the same in its brief. It is therefore deemed to be unnecessary to make any detailed analysis of the evidence which has been introduced by the opposer to establish its title to "Coca-Cola" or of that which has been introduced in behalf of the applicant for the apparent purpose of impairing the same.

The opposer has not established, by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has even been misled as a result of any similarity or resemblance between the marks "Coca-Cola" and "Koke," into a purchase of applicant's goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark "Koke" bears to the mark "Coca-Cola." It is therefore held that the opposer is dependent upon the allegation of the amended notice to the effect that "Koke" is a common abbreviation and familiar nickname which has been adopted and used by the public as a means of distinguishing opposer's goods from other goods of the same descriptive properties.

The opposer has introduced the testimony of numerous

witnesses located in different sections of the country to the effect that customers at soda-fountains who ask for Koke accept Coca-Cola without objection. In many instances such customers, when asked if they meant Coca-Cola, answered in the affirmative. Some of the witnesses testified that, to their recollection, "Koke" had been used as a nickname for "Coca-Cola" for as much as twenty or twenty-five years. No attempt will be made to make a detailed analysis of the mass of testimony which has been introduced to establish this point of opposer's case. It is objected to by the applicant on the ground that it is the testimony of interested witnesses and to a certain extent that is true. Much of it is the testimony of detectives employed by the opposer and sent to different parts of the country for the express purpose of collecting evidence. Much of it is the testimony of customers of The Coca-Cola Company. Some of it must be entirely disregarded on the ground that it is mere hearsay. Some was properly objected to on the ground that it was given in response to leading questions. A large proportion of this evidence, however, is free from objection, other than that it is the testimony of witnesses who, as customers or employees, are more or less interested in the success of the Coca-Cola Company as a commercial institution. No good reason has been shown why such evidence should not be accepted as true. It has been abstracted and tabulated, for convenient reference, on pages 137 to 171 of opposer's brief. It has been satisfactorily rebutted and counsel for applicant do not contend that the word "Koke" has not been so used.

The argument relied upon by applicant is that "Koke" is in many instances used by the public in a generic sense as a name for any of fifty or more cola drinks which may be found for sale on the market (Applicant's Brief, pp. 162, 163, 167, 168) and that to such extent as "Koke" is used by the public as a name for "Coca-Cola" such use should not be regarded as having originated because of any similarity between the

marks "Koke" and "Coca-Cola," but because of an alleged general impression that "Coca-Cola" contained some sort of powerful, habit forming drug such as cocaine (Applicant's Brief, pp. 156, 157). (It will therefore be regarded as an established fact, for the purpose of deciding this case, that the word "Koke" has been used quite generally for many years in certain sections of the country, and particularly in Texas, as an abbreviation or nickname, intended to distinguish) opposer's goods from goods of like descriptive properties.

The arguments which have been advanced in applicant's brief (pp. 157, 163, 167, 168, 252), to the effect that "Koke" is a generic term used by the public as a nickname for any one of a class of fifty or more beverages to be found on the market, is based, in part at least, on testimony which is not a part of the printed record. By agreement of the parties, approved by the Patent Office, the testimony in this case was taken contemporaneously with the testimony in certain court proceedings pending between the same parties. Certain testimony taken by the applicant was not entitled as testimony to be used in this proceeding before the Patent Office. A type-written copy thereof was introduced by the opposer but was not printed. This testimony might have been used by either party, had it been printed as required by the rules. Because neither party printed the same it was ruled at the hearing, after reading the agreements relative thereto (Applicant's Rec., p. 66; Applicant's Brief, pp. 157 to 161), that the unprinted testimony should not be considered in behalf of either party to the interference.

Applicant's argument to the effect that "Koke" is a generic term used by many persons as a name for a class of drinks is not dependent solely upon the unprinted portion of applicant's record. Evidence in support of such a use of that term is to be found in the printed records of both parties (see testimony of Boylin, Qs. 52 to 64, Applicant's Rec., pp.

216, 217; Sidebottom, XQs. 110, 111, Applicant's Rec., p. 254; Brown, Q. 14, Opposer's Rec., p. 1039; Christy, XQs. 135, 136, Opposer's Rec., p. 1903). Moreover, to such extent as the use of "Koke" as a generic term or name for a class of drinks may be found to constitute a reason for refusing to register the same as a trade-mark, the use in that sense may be regarded as formally admitted by counsel for applicant (Applicant's Brief, pp. 157, 163, 167, 168).

In view of the rulings which have been made to the effect that the word "Koke" is used to a material extent by persons desiring to purchase Coca-Cola, and that the same word is frequently used as a generic term or name for a large class of drinks, the applicant's right to register is held to be dependent upon proof that "Koke" was used as a distinguishing mark for applicant's goods prior to the time at which the public began to use that word either as a nickname for "Coca-Cola" or as a generic name for any cola drink (*Stachelberg et al. v. Ponce*, 128 U. S., 686; 46 O. G., 337; *Corbin v. Gould*, 133 U. S., 308; 51 O. G., 622; *Denver Chemical Mfg. Co. v. Lilley et al.*, 216 F., 869). Even should it be found that applicant's alleged prior use is established by the evidence, applicant's right to register may be defeated by proof of abandonment at a subsequent date. The evidence bearing upon these features of the case will now be taken up for consideration.

The applicant has introduced testimony to establish an adoption and use of "Koke" as a distinguishing mark for goods sold by its predecessors as early as the year 1888. If such use is established it would doubtless entitle applicant to register in the absence of evidence of abandonment. Few of the many witnesses who testified as to the use of the word "Koke" as a nickname for "Coca-Cola" attempted to carry such use back farther than from ten to fifteen years and such dates were not established by association with other events or by documentary evidence. A ruling that the word "Koke"

was so used to any material extent, prior to the year 1900 would doubtless be unwarranted in view of the testimony upon which it must be used. On the other hand the opposer contends that the use of "Koke" as a mark for applicant's goods is not established at a date earlier than the year 1909. Use of the word "Koke" at that late date would not entitle applicant to register because of the earlier use of the same word as a nickname for "Coca-Cola."

The history of the adoption and use of "Koke" as a name or mark for applicant's product, will first be very briefly outlined in accordance with the testimony of J. C. Mayfield, Sr., given during his examination as a witness for applicant. This witness, J. C. Mayfield, Sr., president of the applicant, Koke Company of America, will hereinafter be referred to as "Mayfield," as a convenient means of distinguishing between him and his sons, whose names will be given in connection with their respective initials.

According to Mayfield's testimony, the Pemberton Medicine Company of Atlanta, Georgia, at the time that partnership was formed, took over Pemberton's entire business, including the manufacture and sale of Wine of Coca, Coca-Cola, Globe Flower Cough Syrup, Indian Queen Hair Dye, and several other remedies and preparations. Mayfield testified that he got the Coca-Cola formula directly from Pemberton who explained it to him and permitted him to copy it in a note book. According to his testimony the Pemberton Medicine Company, as a part of its regular business, continued to manufacture and sell Coca-Cola for a few months, after which a dispute arose between Pemberton and the other partners, Murphy, Bloodworth, and Mayfield, as to the company's right to Coca-Cola, and before the end of the year 1888 it was decided that the company should discontinue the use of the name "Coca-Cola" and market the same product under the name "Koke." Before the end of that year Murphy retired and Pemberton died. A settlement was made for the purpose

of closing out the Pemberton interest as a result of which Mrs. Pemberton received the formula to the Indian Queen Hair Dye and one-third of the manufactured stock on hand. The business was then continued by Mayfield and Bloodworth.

Mayfield testified that at some time between the years 1890 and 1892, it was decided to get rid of the patent medicines and push "Koke" only. At about this time he claims to have met an old friend named Ealey who became interested in the "Wine of Coca" and in 1893 a separate company, the Wine of Coca Company, was organized to take over that preparation. In 1895, Mayfield claims to have bought out Bloodworth and to have continued the business in Atlanta as sole proprietor until about the end of the year 1898.

About the end of the year 1898 Mayfield claims to have left Atlanta. He first did a little manufacturing in New Jersey and between the year 1899 and 1909 he became interested in various business establishments in Birmingham, Nashville, and St. Louis. When he went to Birmingham, in 1899, he succeeded in interesting one Brittain in his new drink "Celery-Cola" with which he claimed to have been experimenting in Atlanta. He and Brittain then started a bottling business for the purpose of exploiting "Celery-Cola." From this time on Mayfield claims to have manufactured and sold both "Celery-Cola" and "Koke" continuously until 1909 in some one or more of the establishments with which he was connected in the above mentioned cities. That "Koke" has been used by Mayfield and the companies with which he has been associated since 1909 does not appear to be disputed (Opposer's Brief, p. 11). This admitted use of applicant's mark during the last six years and the various business organizations with which he has been associated in Texas, Louisiana, and elsewhere, are not at issue in this proceeding and need not be discussed.

That the Pemberton Medicine Company of Atlanta,

Georgia, made and sold, during the period from 1888 to 1898, in containers bearing the label "Koke," a product which was used in the making of a soda fountain beverage, is held to be established. This ruling is in no manner dependent upon the testimony of Mayfield himself. It is based upon the testimony of several competent witnesses including one of the original partners, Murphy, (Applicant's Rec., p. 393); a daughter and a son in law of another of the original partners (Banks, Applicant's Rec., pp. 516, 525; Miss Marian Bloodworth, Applicant's Rec., pp. 347, 351, 356, 357) and a friend who visited Mayfield from Alabama about 1892 or 1893 (Holley, Applicant's Rec., pp. 373, 374). These witnesses have not been impeached and there is no apparent reason why their testimony should not be accepted as true.

Evidence has been introduced in behalf of the applicant which is believed to warrant the conclusion that Mayfield continued to make and sell a beverage of some kind under the name "Koke" for a short period at least after he left Atlanta. McGraw, an Alabama bottler, testified (Applicant's Rec., pp. 421, 423) that he has bottled Koke purchased from Mayfield, "off and on" (Applicant's Rec., p. 422) ever since about the year 1900. He admitted that he had lost track of Mayfield at times and has been unable to get the product for periods of time, the extent of which is more or less uncertain. He testified, however, that he bottled and sold Koke during the years 1900, 1901, and 1902, and gave a list of several of his customers (Applicant's Rec., pp. 432, 433). It would seem that this testimony as to sales of Koke in 1901, 1902, and 1903, might have been rebutted if not true.

The applicant has introduced the testimony of numerous witnesses to the effect that he continued to manufacture and sell "Koke" during the years 1904 to 1909 when, according to his own testimony, he was most interested in "Celery-Cola" (Applicant's Rec., p. 906). The testimony of many of those

witnesses is too uncertain and indefinite to be given any weight as evidence.

Casey first testified that Mayfield was selling Koke twelve years ago (Applicant's Rec., p. 416). He then testified that he meant eight or nine years (Applicant's Rec., p. 418); then said it was "about eight years" (Applicant's Rec., p. 418); and admitted that he could not remember the year or date.

Sidebottom testified to knowledge of the use of Koke by Mayfield for eighteen years (Applicant's Rec., p. 246). On cross examination he cut the time down to twelve or fourteen years (Applicant's Rec., p. 258) and then admitted that he could not remember "Koke" but confused the same with "Cola" (Applicant's Rec., p. 259).

Freed, on direct examination, testified that he had bought Koke from Mayfield continuously since about thirteen years ago (Applicant's Rec., 262). On cross examination he first admitted that he did not know anything about "Koke" either as an extract or as a syrup until about seven years ago (Applicant's Rec., pp. 275, 276) and then admitted that he could not remember about "Koke" (Applicant's Rec., pp. 290, 293).

Mayfield's son, R. S. Mayfield, testified that his father continued to manufacture "Koke" at Birmingham until 1908 (Applicant's Rec., p. 545). Although he claims to have been on the road for his father from 1903 until 1908 (Applicant's Rec., pp. 545, 571, 581), selling Koke, Celery-Cola, etc. (Applicant's Rec., p. 588) he could not remember the names of any of the customers to whom he sold Koke (Applicant's Rec., p. 591).

Another of Mayfield's sons, J. W. Mayfield, also claims to have been on the road selling "Koke" for his father from 1903 to 1907 (Applicant's Rec., p. 641) but could not name any of their Koke customers (Applicant's Rec., pp. 686, 690).

But it is deemed unnecessary to make a detailed analysis of the many witnesses who were examined in behalf of the

applicant in view of the admissions and contradictory testimony of Mayfield, himself, through whom the applicant claims title, as its immediate predecessor. Mayfield is now the president of the Koke Company of America and must be regarded as having been at all times, since its first alleged adoption and use, the person most interested in the success of Koke. His conduct and admissions, so far as they raise presumptions which are against the interest of the applicant, must be regarded as of more weight than indefinite and conflicting testimony of other witnesses. It will be shown that his own testimony in support of the applicant's case must be ignored and that his conduct and admissions during the period from 1904 to 1909, and subsequent thereto, as established by the record, warrant the conclusion that he abandoned Koke some time between 1903 and 1909, during which period he was pushing Celery-Cola.

The conclusion that Mayfield is not to be relied upon as a witness in behalf of the applicant and that his testimony in support of applicant's case must be disregarded is clearly warranted in view of his answers to questions asked him when examined as a witness for the opposer during the taking of its testimony in rebuttal. The opposer had introduced evidence to the effect that in the year 1907 one of Mayfield's employees, Rice, had been prosecuted for the alleged theft from Mayfield of a formulae book and some of his stock in trade. On direct examination Mayfield was asked if he were present at the hearing of the case of *State v. Rice* and had answered (Applicant's Rec., p. 937) "No." After the opposer had established, by evidence in rebuttal, that Mayfield was present and testified in that case, Mayfield offered the explanation that the record is erroneous and that he had actually answered "Yes" (Opposer's Rec., p. 2694).

The opposer, in its brief (pp. 36 to 47), has tabulated extracts from Mayfield's testimony as a convenient means for comparing that which he gave in the case of *State v. Rice*,

with that given in this case; first, as a witness for the applicant, and subsequently as a witness in rebuttal for the opposer. It is unnecessary, however, to enter into any detailed discussion relative to the contradictions and inconsistencies to be found in Mayfield's testimony or of the testimony which he has submitted in explanation of the same. His conduct as a witness in rebuttal for the opposer, is alone sufficient to warrant the conclusion that his testimony cannot be relied upon. Although repeatedly cautioned that if he did not remember the facts he should so state (Opposer's Rec., pp. 2720, 2728, 2729), he persistently answered "Yes" when asked as to certain facts, at the same time admitting that he remembered nothing about the matter (Opposer's Rec., pp. 2746, 2747, Qs. 293 to 297; p. 2726, Qs. 357, 358; p. 2727, Qs. 365, 366; p. 2733, Q. 429; p. 2739, Q. 473). He apparently attached no importance to the fact that he was testifying under oath.

In his testimony in the case of *State v. Rice*, although Mayfield was subjected to an extensive cross-examination relative to his various formulas and as to the business of The J. C. Mayfield Manufacturing Company, he said not a word about "Koke." That was in 1907. He testified that at that time the company was doing nothing except to supply the Celery-Cola Company with its specialties, "Celery-Cola" and "Pep-sinola" (Plaintiff's Rebuttal Exhibits 4, 5, 6 and 7).

In 1911 Mayfield learned that the Murfreesboro Bottling Works, of Murfreesboro, Tennessee, was carrying on some kinds of a business under a registered trade-mark "Koke" (Applicant's Rec., p. 789). Mayfield's Company purchased that registration for a material consideration (Defendant's Exhibit No. 67) without entering into any contest, although Mayfield claims to have used the name "Koke" as a distinguished mark for his goods continuously since the year 1888. The earliest date of use alleged in the Murfreesboro registration is May 1, 1902 (Defendant's Exhibit, No. 129). Mayfield

admits that he took nothing from the Murfreesboro Bottling Works, as a result of this transaction, other than the certificate of registration. The business and formulae were not transferred (Applicant's Rec., pp. 860 and 923).

In 1913 Mayfield was notified that an application for registration of the word "Koke" as a trade-mark for a non-alcoholic beverage, was being prosecuted before the U. S. Patent Office by one William L. Bitting of Texas. Instead of contesting an interference with Bitting, whose earliest alleged date of use was November 10, 1898, Mayfield's Company bought Bitting's application and had the mark registered to the Koke Company of America as assignee (Applicant's Rec., pp. 829, 830, 923; Defendant's Exhibits No. 126 and No. 128). The applicant took nothing from Bitting in the nature of apparatus, labels, formulae or other tangible assets, is admitted (Applicant's Rec., pp. 921, 922). Applicant purchased nothing but the bare application for trade-mark registration together with a label registration owned by Bitting (Defendant's Exhibits No. 126 and No. 127).

In the fall of the year 1910, the Koke Companies, of which Mayfield was president, filed applications for registration of "Koke" as a trade-mark in twenty or more states of the Union (Applicant's Rec., pp. 830 to 835). Certified copies of several of these applications for state registration are found in the record (Plaintiff's Rebuttal Exhibits, No. 84 to No. 89). In each instance the application is verified by Mayfield and in no case did he allege a date of use earlier than June, 1909.

Although Mayfield claims to have manufactured and sold Koke continuously from 1888 up to the time when the Koke Company of America was organized in 1911 (Applicant's Rec., p. 808), including the period during which he was in business in Birmingham (Applicant's Rec., p. 785), the opposer has introduced as evidence in rebuttal the testimony of numerous witnesses to the effect that they were employees of

Mayfield's Birmingham companies and that they never heard of "Koke" during that period of employment. These witnesses include Mayfield's salesmen, bookkeeper, stenographer, labeler, chemist, bottlers, bottle washers, shipping clerk, delivery clerk, and draymen (See Opposer's testimony in rebuttal by Ellis, Barclift, Pogue, Moody, Hooper, W. M. Smith, Ensley, Dickson, Brewer, the Andersons, Crawford, Thomas, Benham, Barrow, Bevell, and Garrett). Mayfield's St. Louis salesman, Leaver, and his St. Louis chemist, Bolme, also disclaim any knowledge of Koke during their employment by the J. C. Mayfield Manufacturing Company in 1903 and 1904 (Opposer's Rec., pp. 1919, 1930).

The applicant has been unable to produce specimens of any labels, advertising, letter heads, bills, or other physical exhibits, illustrating the manner in which "Koke" is alleged to have been used prior to the year 1909. As evidence in rebuttal, the opposer, by subpoena *duces tecum*, introduced a number of letters, envelopes, and other papers of the J. C. Mayfield Manufacturing Company and of the Celery Cola Company, of Birmingham, Nashville, and St. Louis, bearing letters signed by Mayfield and dated 1904, 1905, and 1906 (Plaintiff's Rebuttal Exhibits, No. 11 to No. 60). In none of these papers does the word "Koke" appear, either in the heading or in the subject matter, although the name "Celery-Cola" is conspicuously set forth in most of them. That these letters are authentic is clearly established (Opposer's Rec., pp. 1558 to 1573 and p. 2765).

In one of the letters (Plaintiff's Rebuttal Exhibit, No. 12) which Mayfield admits (Opposer's Rec., p. 2765) having written to Pogue in 1905, he says, with respect to a case involving his Celery-Cola:

"We must win this case for Celery-Cola is my all."

In 1909 Mayfield and others were prosecuted by the United States Government under the "Food and Drugs Act" on the charge of misbranding in connection with sales of Celery-

Cola in interstate commerce (177 Fed., 765). The charge appears to have been based upon analyses by the government chemists who found that Celery-Cola contained cocaine and caffen. With reference to this prosecution and its effect Mayfield says:

"Well, that went down against us, under those conditions, against Celery-Cola, which virtually murdered it unjustly. My competitors used it against us and I saw it was an uphill pull to try to overcome a thing of that kind. Well, we had had a good trade on Celery-Cola and a good trade on Koke, a pretty fair trade on Pepsi-Nola, and I made up my mind then to give my entire time, push and energy to Koke, because it had not had the black eye that Celery-Cola had." (Applicant's Rec., p. 787.)

And again about this same matter Mayfield testified as follows:

XQ. 845. And then some of you sent syrup to in barrels with labels on it, Koke labels on it?

A. I did not go into the syrup business very much until 1909 or '10 along there.

XQ. 646. That was when you went into the syrup business.

A. Yes, sir, largely into the Koke syrup business, that was when I had trouble with Celery-Cola and got a black eye, with cocaine in it, the government found it and then I thought I would naturally have to overcome that and I pushed Koke.

XQ. 647. But Koke had been your biggest seller up to that time?

A. I would not say that.

XQ. 648. How was the proportion between Koke and Celery-Cola up to the time you dropped Celery-Cola practically and took on Koke exclusively?

A. Well, Koke from '88 to 1900, we sold more possibly.

XQ. 649. That Celery-Cola?

A. Celery-Cola for several years, I believe was in the lead.

XQ. 650. That is, up to this suit?

A. Up to this suit, and since then we have done more Koke business because we have pushed it. (Applicant's Rec., p. 872.)

It is the opposer's contention that Mayfield, and the companies in which he was interested, used the name "Koke," for the first time, after the government prosecution, in 1909, with respect to the misbranding of Celery-Cola. It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word "Koke" as a name for a soda fountain beverage during the period from 1888 to 1903, after which Mayfield became most active in his efforts to promote Celery-Cola, but that any trade-mark right which may have been acquired during that period prior to 1903 was clearly abandoned during the following period from 1903 to 1909. Such abandonment of any prior use which may have been made is held to be satisfactorily established by the evidence. Any other conclusion is deemed to be untenable in view of Mayfield's testimony in the case of *State v. Rice, supra*, his affidavits in his applications for state registration, his purchase without contest of the Murfreesboro registration and the Bitting application, the absence of the word Koke in any of the letters and other papers introduced by Pogue (Plaintiff's Rebuttal Exhibits, No. 11 to No. 64), his admission in a letter to Pogue in 1905 that Celery-Cola was "his all," and the testimony of the Birmingham and St. Louis employees of the Mayfield companies to the effect that they never heard of the word "Koke" during their employment. This evidence is all consistent with the conclusion that Mayfield had abandoned any use which he had previously made of "Koke" as a trade-mark and that he readopted the same in 1909 only because the government prosecution against "Celery-Cola" discouraged him from thereafter attempting to market his goods under that name.

That the applicant acquired nothing by the purchase of the bare trade-mark registrations and application for registration, one from Murfreesboro Bottling Works and the other from Bitting, cannot be seriously questioned. It is so well settled that a trade-mark cannot be transferred, independently

of the business and good will in connection with which it has been used, as to render further discussion or the citation of authorities unnecessary.

The ruling which has been made herein, to the effect that applicant's predecessors made some use of the mark "Koke" and abandoned the same prior to its readoption by Mayfield in 1909, is of substantially the same effect in deciding this case as though it had been ruled, in accordance with opposer's contention, that the mark had never before been used. In 1909 it was too late for applicant to acquire the right to use "Koke" as a trade-mark "*Stachelberg et al. v. Ponce, Corbin v. Gould, Denver Chemical Mfg. Co. v. Lilley et al, supra*". At that time it was already, as established by the record in this case, a common nickname, throughout certain sections of the country, for opposer's goods. Moreover, according to applicant's own contention, the word "Koke" was then in common use, in many localities, as a generic name for any one of a large number of cola beverages, which alone would clearly bar applicant's right to register.

The opposer contends, and has introduced a large amount of evidence as proof, that the applicant has resorted to unfair and unlawful methods of marketing its goods as a competitor; that it has imitated opposer's product and the containers in which it is distributed and sold; that it has sought to induce retailers to wilfully and intentionally substitute and sell its product as that of the opposer; and that it has persistently harrassed those who will not do so. On the other hand, the applicant has submitted evidence to the effect that the opposer has attempted to monopolize the market and has resorted to threats and intimidating measures to prevent the sale by competitors of any product similar to Coca-Cola. Whether these alleged facts are material to the issues which have been raised in the court proceedings, in which the testimony submitted for use in deciding this case is also entitled, is a matter with which this tribunal is not concerned. Such

testimony is deemed to be entirely irrelevant to any issue which is properly raised for determination by the notice of opposition and has therefore been disregarded in deciding this case.

The opposition of The Coca-Cola Company is sustained, and it is adjudged that the applicant, Koke Company of America, is not entitled to the registration for which it has made application.

Limit of appeal: June 24, 1916.

H. E. STAUFFER,
Examiner of Interferences.

May 24, 1916.

APPENDIX V.

DECISION OF THE COMMISSIONER OF PATENTS.

Hearing
July 27, 1916.

J. R. S.

IN THE UNITED STATES PATENT OFFICE.

The Coca-Cola Company *vs.* Koke Company.

Opposition No. 1424.

Appeal from Examiner of Interferences.

Trade-Mark for Refreshing Non-Alcoholic Beverage not in the
nature of a Food and a Soda Fountain Syrup.

Application of the Koke Company filed June 23, 1913, No.
71,308, published December 9, 1913.

Messrs. Harold Hirsch and Frank F. Reed & Edward S.
Rogers, and Messrs. F. L. Brown and Francis M. Phelps
for The Coca-Cola Company.

Mr. F. T. H. Johnson for the Koke Company.

There has been much litigation bearing upon the matter here presented. In *United States v. Coca-Cola Company*, 241 U. S. 265, decided about a year ago, the case was remanded for further proceedings. The outcome of this case may affect the right of the company to apply the name "Coca-Cola" to its product which, I think, would affect the standing of the opposer. But this suit has not according to my latest information, though now under negotiation, been finally disposed of.

Of more direct bearing upon the issues here presented are two district court decisions. The first is the decision of Judge Sawtelle of the District Court of Arizona. The opinion is found in the brief of the Coca-Cola Company before the Commissioner, page 85. The decree was dated September 16, 1916. I understand that the appeal has not been disposed of.

The second decision was in the District Court for the Eastern District of Louisiana. The decree, by Judge Foster, is dated May 24, 1917, and a certified copy was filed with me on the first day of June, 1917.

In each of these decrees there are findings of fact that the word "Koke" is an abbreviation of the name "Coca-Cola" used by the public and by purchasers in designating coca-cola; that the Koke Company of America, and its predecessor, did not adopt or use the name "Koke" until the year 1909; and that it was adopted and used with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

In the brief for the Koke Company it is urged that the injury alleged by the opposer must arise from a mark which falls within the inhibition of Section 5 of the Trade-Mark Act. A motion was made by the applicant to dismiss the opposition for failure to state a cause of action. This motion was denied by the First Assistant Commissioner in an opinion dated January 13, 1915 (see Schedules referred to in the brief for the Coca-Cola Company, page 101).

I agree with the contention by the opposer that the mark sought to be registered is not a mark by which the goods of the owner of the mark may be distinguished from other goods of the same class; that it is in fact a mark by which, partly because of popular usage, the goods of the applicant would be confused with the goods of the opposer and that the opposer would therefore be injured by the registration of the mark within the meaning of the statute.

This disposes of the contention by the applicant that the op-

poser's case must fall because merely an allegation of unfair competition.

The opposer was permitted to amend his notice of opposition. (See the opinion of the First Assistant Commissioner dated September 5, 1914, in the Schedules in the brief for the Coca-Cola Company, page 145.) I agree with the First Assistant Commissioner that the purport of the original and amended notice is broadly the same and set forth in effect the same grounds of opposition.

While it is true that opposition proceedings under the statute are intended to be summary and the rule is, therefore, strict respecting the time within which they may be brought and respecting amendments after the statutory period has expired, yet I can see no reason for overturning the deliberate action of the office upon this point. Moreover, it would make little difference in the outcome so far as the Koke Company is concerned whether the point that the word "Koke" is not a distinctive name of the applicant's goods is pressed by an opposer or raised by the office of its own motion as a reason for refusing registration.

The finding of fact as to the use of the name "Koke" arrived at by the examiner of interferences is somewhat different from that by the District Courts indicated above. I do not think the difference in the conclusion reached by the examiner of interferences and by the courts important, in view of the showing as to the popular use of the word "Koke" whether as a nickname for "Coca-Cola," as insisted by the opposer, or as a slang name for a whole class of syrups in which caffeine is an ingredient, as contended by the applicant. In any event, the word fails to distinguish applicant's product. Nothing but a clear showing of continuous use, beginning before the word became common on the lips of the public, could justify the office in registering it.

In fact, it is not seen why anyone should wish to adopt such a trade-mark unless it were to justify the retailer in sell-

ing his goods on the ground that they were called for when, in fact, the customer had no such thought in mind in asking for a "Koke."

There is, in truth, much testimony to which attention is called in the brief filed on behalf of the Koke Company to just this general effect. I refer to the testimony cited or quoted on pages 167 *et seq.* under the caption, "The nickname or slang expression 'Koke' does not indicate or designate opposer's product exclusively—hence opposer will not be 'damaged' by the registration."

Of the cases cited the one which seems to me to come the closest is what is known as the "Denver Mud" case (*Denver Chemical Manufacturing Co. v. Lilley*, 216 Fed. Rep., 869.)

This, of course, was not a case of opposition or a question of registration. It did not involve the question whether "Denver Mud" was a proper trade-mark. It was merely a case of unfair competition. It was claimed by the appellant, who was the manufacturer of antiphlogistine, that if a customer should go into almost any drug store in almost any part of the globe and ask for "Denver Mud" he would be handed a can of antiphlogistine.

It was specifically held that the term "Denver Mud" was applied by the public to plastic dressings before antiphlogistine was placed on the market. Under this state of facts the conclusion was reached that the owners of the mark "Antiphlogistine" had not made out a case of unfair competition.

In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trade-mark the popular pseudonym for the goods which he sells. The answer must be in the negative.

The examiner of interferences is sustained.

THOMAS EWING,
Commissioner.

Aug. 14, 1917.

